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## **\*\*\*TERMS AND FRAMEWORKS\*\*\***

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## **\*Definitions\***

## **Due Process**

### **DUE PROCESS COVERS WIDE RANGE OF RIGHTS AND PROTECTIONS**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 10-1

What are these due process rights? Based on the provisions of the Constitution, they begin with the privilege of the writ of habeas corpus. A “next friend” of a person arrested may petition for such a writ from a court, which then requires those holding someone in detention to produce the person and justify the detention before a judge. This is a crucial guarantee against secret police and death squads acting “extra-judicially” against people and organizations they view as enemies of the state. Due process includes protections against unreasonable searches or seizures in obtaining evidence. A search must specify what is being sought. There can be no general warrant against large groups of people, but only individual warrants against specific suspects. This prevents fishing expeditions designed to harass individuals and groups. From time the police focus an investigation on a suspect, that person is entitled to counsel, and counsel must be provided if an individual cannot afford to hire a lawyer. Anyone arrested must have charges brought against him or her within a reasonable period of time or else be freed. The individual arrested has a right to know the charges, and these charges may not include bills of attainder (a charge against an individual brought by the legislature) or ex post facto charges (a law making an act a crime after it was committed). An arrested person has a right to reasonable bail (except for capital offenses) once charged. He or she has a right to a speedy trial (before a jury in capital offenses) and a right to a jury of one’s peers. At the trial the accused has a right to confront witnesses and cross examine them, a right to call witnesses and present evidence, and a right against self-incrimination (which extends to testimony from spouses). The accused has a right to examine evidence and question its authenticity. The accused may call for the exclusion of evidence if it was illegally or unconstitutionally obtained. The accused has a right to an unbiased judge, a right to a verdict and sentence defined by law, and a sentence if found guilty that does not involve excessive fines or cruel and unusual punishment. If found guilty, the defendant has a right to appeal to a higher tribunal on matters of law and on matters involving police, prosecutorial or judicial misconduct, and a right to obtain a transcript of the trial so that it can be submitted to a higher court. If found innocent, the former defendant is protected against double jeopardy (i.e., a new trial).

## **Terrorism**

### **TERRORISM CAN BE MEANINGFULLY DEFINED AS VIOLENCE SENDING A MESSAGE**

Ken **Robertson**, **AnalyticA Research Ltd.**, **THE JOURNAL OF CONFLICT STUDIES**, Fall **1999**, p.180-1.

However, my main debate with Guelke is his desire to give up on the idea that there is something distinctive that we can call terrorism. It is true that it is often difficult to distinguish ethnic conflict from guerrilla warfare or national liberation struggle from civil war but I would argue that in all of these cases one can still identify something called terrorism. He rightly rejects the argument that terrorism can be distinguished from other forms of violence because civilians are targeted, although for the wrong reason. He argues that attacks on civilians are a part of modern war and that therefore one would be obliged to accept that many states are terrorists. If this was the argument then the dilemma of choosing to describe Britain as a terrorist state, say between 1942 and 1945, or abandoning the label may well lead one to choose the latter. But it is a false dilemma. An attack on a soldier can be just as much an act of terrorism as planting a bomb in a shopping centre. The issue does not rest on the nature of the target but on the objective of the violence. As Tucker described earlier the key issue is whether the aim is to destroy a target because it stands between you and your objective or whether one destroys it in order to send a message. Terrorism is an act of communication that requires an audience who identify with the victim and, at least in part, understand the message being sent. If the bombing of German cities was about sending a message to the German people then it may indeed have been terrorism but if the aim was to destroy people and property then it was not. It is not always easy to determine the aim of violence but Guelke fails to see that this is the central issue and not the red herring about the innocent or guilty. These concepts are subjective and would leave the field ridden with confusion. Objectives may be unclear or confused but there is at least the possibility of arriving at some form of scholarly judgment about what they were. In conclusion, I find Tucker to be a very valuable addition to the literature because, although he does complicate our lives, he sticks like a rock to the key idea: terrorism is an act of violence in which the target is not the important objective, the aim is the impact of the act on others.

### **TERRORIST TACTICS CAN BE DEFINED EVEN IF WHO IS A TERRORIST CAN'T BE**

Jeffrey **Simon**, former **RAND Corporation terrorism specialist**, **THE TERRORIST TRAP**, **1994**, p.384-5.

The difficulty in defining terrorism has given rise to the famous slogan, "one person's terrorist is another person's freedom fighter." Communities that support various groups in their violent acts do not necessarily see them as "terrorists." Since the essence of terrorism is the effect that violent acts can have on various targets and audiences, it would make more sense to talk about terrorist-type tactics -- which can be utilized by extremist groups, guerrillas, criminals, or governments -- than to attempt to determine who exactly qualifies as a "terrorist." The blowing up of planes, whether done by Canadian or American criminals such as J. Albert Guay and John Gilbert Graham, or by Libyan agents and the PFLP-GC, is terrorism. The same is true for hijackings, assassinations, bombings, product contaminations, and other violent acts.



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**\*Framework Key\***

## **Framework Critical to Determining What Rights are Due Suspects**

### **VIEWING TERRORISM THROUGH A MILITARY OR LEGAL FRAMEWORK DETERMINES WHAT RIGHTS ARE DUE SUSPECTS**

Tung Yin, **Professor of Law-Lewis & Clark, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 96

For the purposes of this article, I will refer to these competing positions as the Law Enforcement Paradigm and the Military Force Paradigm. Under the Law Enforcement Paradigm, even international terrorism on the scale of that inflicted by al Qaeda is still a matter for the civilian criminal justice system, supplemented by international cooperation regarding the investigation, location, arrest and extradition of criminal suspects. Taken to its ultimate conclusion, the Law Enforcement Paradigm has led to declarations that “the indefinite detention of suspects without charges” was an illegal practice.

Under the Military Force Paradigm, on the other hand, the mass sale of human and economic carnage inflicted by the 9/11 attacks, combined with al Qaeda’s avowed desire for even more spectacular terrorism, present a level of threat to the United States equal to that posed by enemy nations. Responding to this threat therefore requires equivalent national force. In addition, criminal prosecution comes into play after a crime has been committed; its focus is retrospective, aimed at punishing the perpetrator. Proponents of the Military Force Paradigm argue that future acts of terrorism on the scale of 9/11 must be prevented before they occur, not punished after the fact. Prevention of such terrorist attacks requires the use of military force to disrupt terrorist training camps and to kill terrorists before they can strike. Finally, military force proponents argue that civilian trials, due to their openness, will compromise the security of classified information and sources.

### **ASSESSMENT OF WHAT PROCESS IS DUE TERRORISTS DEPENDS ON WHETHER THEY ARE VIEWED AS CRIMINALS OR COMBATANTS**

Michael L. Gross, **International Relations Professor University of Haifa, 2007**, War, Torture and Terrorism: ethics and war in the 21<sup>st</sup> century, ed. D. Rodin, p. 84-5

The criminal behavior of terrorists may then lead officials to invoke the law enforcement paradigm. This demands that states treat terrorists just as they would any heinous criminal, whether an ordinary lawbreaker or war criminal. Law enforcement entails arrest, trial and sentencing, and only permits law enforcement officers to use lethal force when either their lives or the lives of bystanders are in immediate danger. Noncombatant status, however, does demand due process in spite of the difficulties this may entail. Without due process, named killings are nothing but extra-judicial execution and murder. This has led some observers, myself included, to suggest that any party practicing named killings must preserve due process either by maintaining judicial review or by conducting trials *in absentia*. However, as Tamar Meisels points out, neither process is easy to implement with any degree of judicial consistency.

In contrast, the war paradigm carries none of these difficulties or conditions. Combatants are vulnerable regardless of the threat they pose. While they may be shot on sight, combatants nevertheless retain certain rights once they have laid down their arms. Because soldiers are morally innocent, that is, permitted to kill under carefully defined conditions but not guilty of any crime, they may suffer capture and incarceration but only as long as hostilities endure. Once armed conflict ends, prisoners of war, no longer pose a material threat and, having committed no crime, are free to return home. Execution or continued imprisonment is not appropriate for combatants unless they have violated the conditions under which they are permitted to harm others either by torturing other combatants, killing them by forbidden means or wantonly taking the lives of noncombatants. In all other cases, soldiers may kill during armed conflict when it is necessary, proportionate and consistent with the demands of utility. These are the common principles of just war and the conventional laws of armed conflict. Necessity allows nations to exercise armed force only when no other means are feasible to stave off armed aggression. Utility demands that belligerents do not cause more harm than the good they hope to achieve while proportionality limits excessive harm so that even important or necessary goals may not be secured at any cost. In most cases, the cost is measured by harm to noncombatants; proportionality rarely pertains to soldiers. Unless nations face a “supreme emergency” that is, an otherwise unavoidable genocidal threat, there are no grounds for violating the laws of armed conflict. In spite of what human rights activists and indeed, some advocates of named killing maintain, it may make sense to view terrorists as combatants *cum* war criminals. This compels one, however, to extend them the rights and protections both combatants and war criminals enjoy, including protection from named killing.

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## **TERRORISM CAN BE VIEWED THROUGH MILITARY OR LAW ENFORCEMENT FRAMEWORK**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 1-2

On September 11, 2001, more than 3,000 Americans and citizens of other nations were killed at the World Trade Center in New York City, the Pentagon in Washington, DC, and in a field in Pennsylvania. These deaths were caused by terrorists who were able to exploit the openness of American society. By hijacking passenger jets and using them against skyscrapers, they succeeded in perpetrating a horrific feat of “technological jiu-jitsu,” turning an advanced civilization’s technology against itself. These acts—and the potential for follow-up activities—may involve treason (when an American citizen is involved with a group in combat against American forces), or sabotage or espionage (if they involve stealing military or nuclear secrets or cyber-crimes), or acts of terrorism. By *terrorism* I mean the use (or threat of the use) of force against noncombatant (i.e., innocent) civilians with means that violate criminal laws or the laws and customs of war, often on a random basis, with the goal of terrorizing and immobilizing the population in its economic, social, and cultural activities. Terrorists try to change the domestic and/or foreign policies of their government and other governments. Their acts terrorize the population because of the scope of destruction, and because of the randomness of the events. No one can hide, nor can anyone assure personal safety in a society under siege. The actions of terrorists may be considered criminal acts, to be prosecuted in the courts, or may alternatively be seen as acts of war, to be dealt with through military action and military justice, even though the actions are sporadic and not continuous and are not committed by the armed forces of a sovereign nation.

## **TREATMENT OF TERROR SUSPECTS TURNS ON CLASSIFICATION UNDER LAW ENFORCEMENT OR MILITARY PARADIGM**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 223-4

How alleged terrorists or their accomplices are treated depends in part on how their acts (and they) are characterized, as well as on calculations made by the Justice Department and the military on the strength of the case against them, the penalties that a venue can mete out, and the costs that the government might have to incur in terms of disclosure of information and intelligence sources. If the acts are considered criminal acts, their perpetrators (criminals) will be tried in civilian federal courts. If they are considered acts of war against the United States, the perpetrators can be classified either as lawful or unlawful combatants and are under the jurisdiction of the military. The authority under which the government metes out its justice is based on laws that establish and regulate the federal judiciary as well as the military courts, and these laws are supplemented by civilian and military rules of procedure that also have a statutory base. The laws of war, some of which are codified in various international conventions, and agreements relating to ordinary criminal activity that crosses international lines supplement domestic law with a patina of international law, including extradition treaties and human rights conventions.

## **CHOICE OF FRAMEWORK KEY TO ANALYSIS OF LEGITIMACY**

Itzhak D. Bam, **JD Candidate, Harvard Law School, 2004**, Seminar paper for Dershowitz, “Legal Aspects of Israeli Targeted Killing Policy—the Legality of Preemption, no page numbers

The analysis of the struggle on terrorism may be done within two different paradigms. One paradigm conceives terrorism as form of war that triggers the applicability of Law of War, which governs the use of force against terrorists organizations and individuals engage in terrorist activities. The other paradigm is that of terrorism as criminal phenomena that can be dealt by ordinary criminal law and probably by more permissive means available during state of emergency, but it is and can’t be war. In face of terrorism the war-paradigm is more favorable to the victim state actors, while Human Rights NGOs and international community insist on less permissive law enforcement paradigm. Hence, the question is whether the Israeli struggle with Palestinian terrorism can be qualified as war, or armed conflict. Additionally, whether the conflict can be qualified as armed or not, bears on the set of legal provisions govern the activity of the state.

## **US Committed to Military Framework Now**

### **OBAMA HAS REJECTED THE LAW ENFORCEMENT PARADIGM**

Tung Yin, **Professor of Law-Lewis & Clark, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 108-9

As clearly as he repudiated waterboarding and other forms of coercive interrogation, President Obama has equally clearly rejected the Law Enforcement Paradigm. The use of missile-firing aerial drones alone proves as much, for such attacks would usually constitute unjustified force, if not outright murder, in any civilian context. So too would detention absent charges, a practice that the Obama administration has carried over at our military bases at Guantanamo Bay, Cuba, and Bagram Air Base in Afghanistan. But no one should be surprised at President Obama's use of the military to attack al Qaeda. As a candidate, he declared forcefully that if the United States had "actionable intelligence" and Pakistan refused to act, he was completely willing to order American military forces to take action. Military force is a necessary tool in the fight against al Qaeda because there are limits to the reach of law enforcement.

### **US EMPLOYING MILITARY FRAMEWORK – PRIMARY EMPHASIS ON PREVENTING FUTURE TERRORIST ATTACKS – NOT PUNISHMENT OF THE GUILTY**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 7-8

How can the government best combat the terrorist threat? One approach is to consider terrorism a form of warfare, and terrorists a group of "unlawful combatants" not entitled to due process of law or the protection of international conventions regarding the treatment of prisoners of war. Those captured are treated according to their value as sources of intelligence. The idea of terrorism as war against America leads to enhanced surveillance of suspected terrorists, infiltration of terrorist groups by double agents, preventive detention of suspected terrorists, and aggressive interrogation (such as sleep deprivation and psychological manipulation of detainees) to trace back the operatives who are planning new attacks in order to disrupt their operations.

To proponents of this approach, the key question is: What can we do differently that will increase the probability of preventing successful future attacks? What kinds of searches and surveillance will put us on the trail of terrorists? What methods of interrogation will increase the likelihood of obtaining valid information from suspects or detainees? Trying perpetrators or conspirators in courts of law and imposing sentences on them is not nearly as important as gaining the information necessary to prevent catastrophic events. Since deterrence and punishment are less important, and retribution for an act of mass destruction cannot possibly return the scales to balance, it follows that trails to prove suspects guilty are somewhat beside the point. It is apprehension of suspects before the next act of terrorism, and their utility in providing intelligence about their accomplices and organizations, that counts. This approach may even mean transferring detainees from the civilian court system (after dismissal of charges) into military brigs for indefinite confinement and interrogation as "enemy combatants." The data on court cases prosecuted by the government is consistent with this militarized approach: Only 39 people have been convicted in federal courts of crimes related to terrorism, and their median sentence was just 11 months (with only two receiving life sentences). Only 14 people with links to al Qaeda have been convicted in the United States as of summer 2005.

### **CHOICE OF FRAMEWORK KEY – US HAS SETTLED ON THE WAR PARADIGM**

Matthew Evangelista, **Professor Government-Cornell University, 2008**, Law, Ethics & The War on Terror, p. 56-7

Early debates about the most appropriate way to deal with the terrorist threat that manifested itself in the 11 September attacks contrasted a war paradigm with one focusing on traditional law enforcement. The choice of paradigm bears directly on the question of how to treat terrorist suspects, whether in detention or at large. Before the 2001 attacks, the United States had dealt with Islamic terrorists through the criminal justice system. The Federal Bureau of Investigation, for example, identified Sheikh Omar Abdel Rahman and Ramzi Ahmed Yousef as key figures behind the 1993 bombing of the World Trade Center, and gathered enough evidence to convict them in a civilian court and to imprison them and all their accomplices. In order to capture them, US authorities used legal methods to infiltrate their organization, for instance informants wearing listening devices to record incriminating evidence. To convict them, US courts relied on domestic law, with all its protections in favor of the defendants.

For a brief moment, it appeared that US leaders might take a similar approach to Al Qaeda's dramatic escalation of violence. In President Bush's first public remarks on 11 September, at the Emma Booker Elementary School in Sarasota, Florida, he referred to the attacks as a "national tragedy" and vowed "to conduct a full-scale investigation to hunt down and to find those folks who committed this act." That same day, attorney General John Ashcroft spoke of "one of the greatest tragedies ever witnessed on our soil," and similarly promised to "expend every effort and devote all the necessary resources to bring the people responsible for these acts, these crimes, to justice."

By the next day, however, the administration had changed the framing of the incident. Appearing for a photo opportunity with members of his national security team, President Bush announced that the "deliberate and deadly

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attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war.” He articulated two other themes that would henceforth characterize his portrayal of the event: The attacks were directed at “not just our people, but all freedom-loving people,” and the US response would entail “a monumental struggle of good versus evil.”

## **Military Framework Bad: Multiple Reasons**

### **MILITARY FRAMEWORK PROBLEMATIC: MULTIPLE REASONS**

Adrian Guelke, *Professor Comparative Politics-Queens University, 2006*, Terrorism and Global

Disorder: political violence in the contemporary world, p. 187-8

When President George W. Bush declared a war against terrorism in the aftermath of the events of 11 September, the framing of America's response to the attacks was criticized on a number of grounds. Thus, some commentators argued that it was a mistake to declare war on an abstraction. They argued that terrorism was not a concrete concept but rather constitutes a judgment on violent actions without clear boundaries. A similar point was made by others who argued that it was a mistake to declare war on a tactic, reflecting a common approach to the definition of terrorism as encompassing the use of particular methods of violence. According to such critics, it might have been wiser for President Bush simply to have committed the United States to uprooting al-Qaeda as the network responsible for the attacks. Indeed, the Administration's initial narrow formulations of its task as the defeat of terrorism with a global reach, if it had been held to, might have largely satisfied these critics. Other critics focused on the issue of whether it was sensible to couch the struggle against al-Qaeda as a war at all. Lawrence Freedman summarizes their objections as follows:

"First, redefining obnoxious criminal acts as warlike dignifies them and gives the perpetrators an unnecessarily heroic status. Second, instead of objectives being framed in terms of law enforcement and the successful prosecution of the perpetrators, they are framed in terms of military victory. Third, in a war the gloves are off and governments can do things they cannot do when the problems are described in more civilian terms, for example in finding ways to bypass the civil rights of anyone, including foreign nationals, suspected of being implicated in terrorism. This leads in exactly the opposite direction to a judicial approach. Fourth and finally, power within governments shifts to the military and the Pentagon civilians, leading to a harsh foreign policy with scant hope for diplomatic initiatives, let alone attention to the conditions which breed terrorism. "

Freedman accepts that there is "something to all of these arguments," but contends that the scale of 9/11 attacks made war "not a matter of choice but a matter of strategic imperative." At the same time, he acknowledges that among the consequences of war is that it "sharpens the divisions and ensures that multilateralism is only partial in the form of an alliance.

## **Military Framework Bad: Legitimizes Detention Without Charge**

### **MILITARY PARADIGM LEGITIMIZES INDEFINITE DETENTION WITHOUT CHARGE**

Tung Yin, **Professor of Law-Lewis & Clark, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 97-8

The first defining feature of the use of military force against al Qaeda has been the indefinite detention, without criminal charges, of hundreds of persons in Afghanistan or at the US naval base on Guantanamo Bay, Cuba. As the Supreme Court noted, such detention was commonplace in traditional armed conflicts between states; what has been striking about the Bush and Obama administrations' use of military detention has been the fact that many of the detainees have not been members of the armed forces of a state.

### **MILITARY FRAMEWORK ALLOWS PRESIDENT TO CAPTURE, DETAIN AND INTERROGATE ENEMIES**

**US Department of Justice – Memo for Alberto Gonzales, Counsel to the President, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 145-6

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy...It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score.

## **Military Framework Bad: Root Cause of Violence**

**CHALLENGING THE FRAMES OF WAR IS NECESSARY TO SOLVE THE ROOT CAUSES OF VIOLENCE**  
**BUTLER**, PROFESSOR OF RHETORIC AT U.C.-BERKELEY **2009** [JUDITH, “FRAMES OF WAR”, PUBLISHED 2009, PG. PG. 51-53, [CL]]

To perceive a life is not quite the same as encountering a life as precarious. Encountering a life as precarious is not a raw encounter, one in which life is stripped bare of all its usual interpretations, appearing to us outside all relations of power. An ethical attitude does not spontaneously arrive as soon as the usual interpretive frameworks are destroyed, and no pure moral conscience emerges once the shackles of everyday interpretation have been thrown off. On the contrary, it is only by challenging the dominant media that certain kinds of lives may become visible or knowable in their precariousness. It is not only or exclusively the visual apprehension of a life that forms a necessary precondition for an understanding of the precariousness of life. Another life is taken in through all the senses, if it is taken in at all. The tacit interpretive scheme that divides worthy from unworthy lives works fundamentally through the senses, differentiating the cries we can hear from those we cannot, the sights we can see from those we cannot, and likewise at the level of touch and even smell. War sustains its practices through acting on the senses, crafting them to apprehend the world selectively, deadening affect in response to certain images and sounds, and enlivening affective responses to others. This is why war works to undermine a sensate democracy, restricting what we can feel, disposing us to feel shock and outrage in the face of one expression of violence and righteous coldness in the face of another. To encounter the precariousness of another life, the senses have to be operative, which means that a struggle must be waged against those forces that seek to regulate affect in differential ways. The point is not to celebrate a full deregulation of affect, but to query the conditions of responsiveness by offering interpretive matrices for the understanding of war that question and oppose the dominant interpretations—interpretations that not only act upon affect, but take form and become effective as affect itself. If we accept the insight that our very survival depends not on the policing of a boundary—the strategy of a certain sovereign in relation to its territory—but on recognizing how we are bound up with others, then this leads us to reconsider the way in which we conceptualize the body in the field of politics. We have to consider whether the body is rightly defined as a bounded kind of entity. What makes a body discrete is not an established morphology, as if we could identify certain bodily shapes or forms as paradigmatically human. In fact, I am not at all sure we can identify a human form, nor do I think we need to. This view has implications for rethinking gender, disability, and racialization, to name a few of the social processes that depend upon the reproduction of bodily norms. And as the critique of gender normativity, able-ism, and racist perception have made clear, there is no singular human form. We can think about demarcating the human body through identifying its boundary, or in what form it is bound, but that is to miss the crucial fact that the body is, in certain ways and even inevitably, unbound—in its acting, its receptivity, in its speech, desire, and mobility. It is outside itself, in the world of others, in a space and time it does not control, and it not only exists in the vector of these relations, but as this very vector.” In this sense, the body does not belong to itself.



## **Military Framework Bad: Rejection Key to Human Rights**

**ACCOMMODATING THE LAW TO THE “NEW” WAR PARADIGM VASTLY EXPANDS COUNTER-TERROR DETENTION FACILITIES AND DOOMS DETAINEES TO BE HELD INDEFINITELY WITH CONSTANT HUMAN RIGHTS ABUSES**

**AMNESTY INTERNATIONAL, 2010**, WORLDWIDE MOVEMENT OF PEOPLE WHO CAMPAIGN FOR INTERNATIONALLY RECOGNIZED HUMAN RIGHTS FOR ALL WITH OVER 2.8 MILLION MEMBERS [“USA: STILL FAILING HUMAN RIGHTS IN THE NAME OF GLOBAL ‘WAR,’” JANUARY 20, [HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/AMR51/006/2010/ EN/8CCF3BF9-8E47-4B7E-9194-043024A7924/AMR510062010EN.HTML](http://www.amnesty.org/en/library/asset/AMR51/006/2010/EN/8CCF3BF9-8E47-4B7E-9194-043024A7924/AMR510062010EN.HTML)]

While Amnesty International does not question the good faith efforts of the District Court to craft habeas corpus procedures for the detainees, it believes that **the solution to the Guantánamo “problem” lies in all branches of the US government – executive, legislature and judiciary – treating it as a human rights issue.** Instead the issue of Guantánamo, and “counter-terror detentions” more generally, has been treated principally as a domestic national security policy issue under a global “war” paradigm, a framework that has distorted basic notions of due process and opened the door to public fear-mongering by current and former politicians. The perspective urgently needs to change if the Guantánamo detentions are to be ended in a way that does not merely relocate the human rights violations elsewhere.

Regrettably, even some federal judges have adopted positions that can only undermine public confidence in the capacity of the ordinary criminal justice system to play its full role in the

counter-terrorism context.<sup>13</sup>In the al-Bihani decision, Circuit Judge Janice Rogers Brown, who authored the opinion, separately questioned whether “during a time of war”, a “court-driven process is best suited to protecting both the rights of [detainees] and the safety of our nation”. She continued: “War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort”. There are disturbing echoes here of President George W. Bush’s call to his administration in early 2002, in a central policy memorandum on detentions in the “war on terror”, to engage in “new thinking in the law of war”, to take account of this “new paradigm”.<sup>14</sup>**This “new thinking” ignored the USA’s international human rights obligations and bred old, familiar abuses. Diffidence was not the problem, but rather the overconfidence of officials who operated as if unfettered executive power was the guarantor of public safety from violent attack, and a supine Congress and judicial deference should be the order of the day. Systematic human rights violations were the result. The detainees held in Guantánamo and elsewhere, and their families, are still paying the price. There was (and remains) little recognition within any branch of government in the USA that a wide variety of states and peoples have throughout history faced grave threats of large-scale violent attack from non-state groups, and that far from being obsolete, the international human rights law frameworks enacted over the past several decades were developed in a context in which states were acutely sensitive to those threats.**

On the international stage, the Obama administration has put a healthy distance between it and the Bush administration’s view of provisions of the Geneva Conventions as too “quaint” or “vague and undefined” to be suitable for this “new war”. For example, on the 60th anniversary of the Geneva Conventions, the US Permanent Representative to the United Nations, Ambassador Susan Rice, said:

“In recent years, some have called the Geneva Conventions outdated as we face an enemy that is loyal to no state, that hides among civilians, and that routinely violates the law our own forces are obliged to uphold. However, for all the enormity of al-Qaeda’s deadly ambitions, the challenge we face today has its own unfortunate tradition. The framers of the Conventions were perfectly familiar with terrorism, albeit of a different sort. If anything, the conflict we are waging today in Afghanistan, and the struggle against violent extremists and terrorists more broadly, make the Geneva Conventions even more relevant and important”.<sup>15</sup> On the other hand, as noted below, while the Obama administration has spoken of its commitment to international human rights and to meeting its treaty obligations, it has repeated its predecessor’s failure to recognize that international human rights law, such as the ICCPR, applies in this context (and was also developed with an awareness of the long history of these types of threats).<sup>16</sup> Indeed, in litigation relating to Guantánamo, Bagram, the CIA’s rendition, detention and interrogation program, and on remedy for former detainees, the Obama administration has all too often taken essentially the same position as its predecessor, leaving human rights principles disregarded.<sup>17</sup>

Even where international humanitarian law does apply (in situations of armed conflict as recognized by international law), it does not displace international human rights law. Rather, the two bodies of law complement each other. In a resolution adopted as long ago as 1970, the UN General Assembly affirmed the “basic principle” that “fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”. The International Court of Justice has stated that the protection of the ICCPR and other human rights conventions “does not cease in times of armed conflict, except through the effect of provisions for derogation”. The USA has made no such derogation under article 4 of the ICCPR.<sup>18</sup>

In a key national security speech eight months ago, President **Obama emphasised his view that “we are indeed at war with al Qaeda and its affiliates”.** Under this global war theory, he pointed to the possibility that **the USA would develop an indefinite detention regime for those detainees who “cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States”.** “If and when we determine that the United States must hold individuals to keep them from carrying out an act of war”, the President said, “we will do so within a system that involves judicial and congressional oversight”. The administration would work with Congress to develop “an appropriate legal regime”. **There was no mention of human rights in his speech.**<sup>19</sup>

**ALL PRISONER’S NOT CHARGED SHOULD BE IMMEDIATELY RELEASED—WE MUST EMBRACE A HUMAN RIGHTS FRAMEWORK TO CREATE LASTING CHANGE**

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Sherry Hall

**AMNESTY INTERNATIONAL, 2010**, WORLDWIDE MOVEMENT OF PEOPLE WHO CAMPAIGN FOR INTERNATIONALLY RECOGNIZED HUMAN RIGHTS FOR ALL WITH OVER 2.8 MILLION MEMBERS [“USA: STILL FAILING HUMAN RIGHTS IN THE NAME OF GLOBAL ‘WAR,’” JANUARY 20, [HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/AMR51/006/2010/ EN/8CCF3BF9-8E47-4B7E-9194-043024A7924/AMR510062010EN.HTML](http://www.amnesty.org/en/library/asset/AMR51/006/2010/EN/8CCF3BF9-8E47-4B7E-9194-043024A7924/AMR510062010EN.HTML)]

As the USA took its seat on the UN Human Rights Council in September 2009, the administration maintained that the principles of the Universal Declaration of Human Rights are “as resonant today” as they were six decades ago, and that these human rights and fundamental freedoms, including “due process” and “equal rights for all”, are, “in effect, a part of our national DNA”. Among other things, it said, the USA was fully committed to universality: “We cannot pick and choose which of these rights we embrace nor select who among us are entitled to them.”<sup>33</sup> The USA is, however, choosing to deny the Guantánamo detainees the rights to which they are entitled.

A human rights approach to ending the Guantánamo detentions demands that any detainee not charged with a recognizable criminal offence for trial under fair procedures in an independent and impartial court – not a military commission with impoverished due process guarantees reserved for foreign nationals alone – should be immediately released, while ensuring that no-one is forcibly returned to a country where he would face human rights violations.<sup>34</sup> The US authorities should drop any intention to construct a system for indefinite “national security” detention of individuals in Illinois or elsewhere. To do so, on the premise of a global “war” without foreseeable end, in the name of countering the general threat of terrorism, would only entrench more firmly the mistakes made during the years of the Bush administration, putting the USA essentially into a permanent state of emergency which can only corrode respect for human rights in and by the USA, as well as undermining the confidence of its officials and population in the capacity of its own criminal justice system (in cooperation with the criminal justice systems of other states) as the bulwark of protection of the public from threats of violence. Amnesty International urges the USA to move more firmly to restore its time-tested systems of ordinary criminal justice to prominence in countering risks of violent attack against the population by individuals and non-state groups. This does not mean that it has to give up on intelligence gathering and other measures.

As we approach President Obama’s original deadline for his administration to resolve the Guantánamo detentions and close the prison, it is worth recalling the words of his executive order of 22 January 2009:

“In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo would further the national security and foreign policy interests of the United States and the interests of justice”.<sup>35</sup>

A year later, the absence in the executive order of an express commitment to comply with international human rights law in ending the detentions has come home to roost. The issue has become mired in a domestic US political context in which over the short-term it seem less costly to invoke concepts such as “national security” or “global war” to justify deep departures from the USA’s human rights commitments, than to confront and remedy the human rights violations of the past and present. So long as human rights remains largely missing from the analysis brought to bear by the administration, Congress, and the courts, an effective and permanent solution to the real challenges the USA faces will seem elusive.

## **ADDRESSING CRIMES UNDER WAR MENTALITY FACILITATES HUMAN RIGHTS ABUSES**

**Amnesty International**, United States, Human Dignity Denied, Torture and accountability in the ‘war on terror,’ October 27, **2004**, <http://web.amnesty.org/library/Index/ENGAMR511452004>

A war mentality is dangerous for human rights when a government extends the war framework to cover areas that should appropriately be addressed by law enforcement measures, and even then claims that existing laws of war do not cover this “new paradigm”. Amnesty International does not believe that the so-called “war on terror” mandates a new legal framework. The territories and the circumstances in which the confrontation with al-Qa’ida or others actually takes place determine the applicable legal regime, within the existing framework of international human rights and humanitarian law. The US administration’s refusal to recognize this has fed its willingness to countenance the ill-treatment of detainees in the “war on terror”.<sup>(21)</sup>

## **“WAR” FRAMEWORK FOR EFFORT TO COMBAT TERRORISM LIMITS JUDICIAL CHECKS ON EXECUTIVE**

**Shawn Boyne, Ph.D. Candidate, University of Wisconsin**, Tulsa Journal of Comparative & International Law, Fall, **2003**, 11 Tulsa J. Comp. & Int’l L. 111, p. 139-40

The fact that the Bush Administration, with the approval of Congress, n135 has responded to terrorism militarily and framed the Patriot Act as a means to fight that war, may profoundly constrain the judiciary's role. The case of Jose Padilla, the individual suspected of plotting with terrorists to detonate a “dirty bomb,” illustrates the nature of some of these constraints. Jose Padilla, currently sits in a Naval brig in Charleston, South Carolina. The government continues to detain him, not because he is facing criminal charges for his conduct or because he is an alien subject to deportation, but rather because the President has declared him to be an “enemy combatant.” The government maintains that Padilla qualifies as an “enemy combatant” because he is “‘closely associated with al Qaeda,’ engaged in ‘hostile and war-like acts’ and represents [a] ‘continuing, present and

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grave danger to the national security of the United States." n136 Although the government originally arrested Padilla on a "material witness" warrant issued by a federal court, n137 once the President designated him as an "enemy combatant," the government transferred him into military custody. n138 As a result of an order issued by Attorney General John Ashcroft, the military initially prohibited Padilla from meeting with his counsel. It required an interim federal court order filed in the course of Padilla's habeas proceedings for Padilla to gain access to counsel. n139 By declaring a war on terrorism necessitating a state of emergency, the President, through the designation of "enemy combatant" status, has unilaterally restricted legal rights of individuals suspected of participating in the war.

## **Military Framework Bad: Counterproductive to Reducing Terrorism**

### **RESORT TO VIOLENCE COUNTERPRODUCTIVE IN DEFEATING TERRORISM**

**Lord, Nagl, and Rosen 2009** (Kristin, John, and Seth, Kristin Lord is Vice President and Director of Studies at the Center for a New American Security, Dr. John Nagl is the President of the Center for a New American Security. He is also a member of the Defense Policy Board and a member of the International Institute of Strategic Studies, writer for the Center for a New American Society, “Beyond Bullets: A Pragmatic Strategy to Combat Violent Islamist Extremism” 06/09/09, <http://cnas.org/node/975>,  
A pragmatic strategy will require greater use of non-military instruments of power to accomplish American objectives, which will require the reallocation of U.S. government resources. The Defense Department’s spending is approximately 350 times that of the combined budgets of the State Department and the U.S. Agency for International Development (USAID), even though these agencies are equally central to the fight against violent extremism. Perhaps counterintuitively, Secretary of Defense Robert Gates has emerged as a leading advocate of devoting more resources to civilian agencies of government. During a 2007 speech at Kansas State University he said that, “having robust civilian capabilities available could make it less likely that military force will have to be used in the first place, as local problems might be dealt with before they become crises.” When force is required, it must be used at the minimal level necessary to accomplish the task at hand. Additionally, because militaries always risk intimidating local populations by their mere presence, civilian organizations should play leading roles whenever possible. Since ideology unites and strengthens violent extremists, an effective strategy must undermine that ideology’s appeal. A contest for “hearts and minds” lies at the center of a “population-centric” effort to cripple al Qaeda and suppress violent Islamist extremism. Countering the movement’s guiding narrative, discrediting its methods, and sapping it of popular support should be critical benchmarks of success in a new counterterrorism strategy. The United States cannot capture or kill every violent Islamist extremist. Therefore, limiting radicalization and preventing the recruitment of Muslim youths must be an overarching objective.

### **CLASSIFYING GROUPS SUCH AS AL QAEDA AS “MILITARY” UNDERMINES THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK – LAW ENFORCEMENT MODEL BEST** **Philip Alston, Special Rapporteur on Extrajudicial Executions, 2011, Unmanned Aircraft Systems (Drones) and Law, p. 102-3**

With respect to the existence of a non-state group as a “party,” Al-Qaeda and other alleged “associated” groups are often only loosely linked if at all. Sometimes they appear to be not even groups, but a few individuals who take “inspiration” from Al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such “associates” cannot constitute a “party” as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.

To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organized armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. It is also salutary to recognize that whatever rules the US seeks to invoke or apply to an Al Qaeda and any “affiliates” could be invoked by other States to apply to other non-state armed groups. To expand the notion of non-international armed conflicts to groups that are essentially drug cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

### **OVEREMPHASIZING MILITARY NATURE OF WAR ON TERRORISM COUNTERPRODUCTIVE**

**Anne-Marie Slaughter, Professor of International, Foreign and Comparative Law, Harvard Law School, Harvard Journal of Law & Public Policy, Summer, 2002, 25 Harv. J.L. & Pub. Pol’y 965, p. 972-3**

Thus both sides may emphasize war over terrorism, attack over crime, and enemy over criminal largely for domestic consumption in order to mobilize supporters. However, by overplaying the military dimension of this conflict and downplaying the criminal justice dimension, Washington ties its hands in ways that it may come to regret. It raises the stakes of the conflict, making it hard to say when it will end or what the precise objectives are, beyond “defeating terrorism.” And it creates its own momentum, making it harder for U.S. leaders to ratchet back expectations and prepare the nation for the longer and slower process of global intelligence cooperation, police work, and sleuthing

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by financial regulators, which is the approach most likely to result in the apprehension of individual terrorists.

## **Military Framework Bad: Immoral/Unjust**

### **MILITARY FRAMEWORK VIOLATES PROPORTIONALITY**

Alex J. Bellamy, *International Relations Professor-University of Queensland, 2008*, *Fighting Terror: Ethical Dilemmas*, p. 69

Second, the war on terror is disproportionate because, ultimately, it is a war on a tactic, not a specific group of people. Terrorism is the deliberate killing of non-combatants for political purposes. There is no limit on the types of actors that could be terrorists. It is not at all clear how, exactly, one goes about waging war on a tactic. How often does the tactic have to be used for war to be a proportionate response? What is the objective of a war on terror? How do we know when it has succeeded – or is it an unending war? When Japan bombed Pearl Harbor, the US declared war on Japan – the source of the attack – not on “surprise attacks” – the tactic used. Similarly, in relation to the war on terror, a proportionate (and logically coherent) response to the September 11 atrocities would have been to declare war on Al Qaeda and those groups allied to it that were engaging in violent confrontation with the US and its allies. If we do not know who are enemies are, we cannot wage a proportionate war against them.

## **Military Framework Subject to Abuse**

### **VIEWING TERRORISM THROUGH MILITARY FRAMEWORK SUBJECT TO ABUSE – REMOVES KEY CHECKS ON STATE VIOLENCE**

Philip Alston, **Special Rapporteur on Extrajudicial Executions, 2011**, Unmanned Aircraft Systems (Drones) and Law, p. 99-100

Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the Framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily.

## **Military Framework Ineffective: Terrorists Can't be Deterred**

### **TERRORISTS CAN'T BE DETERRED MILITARILY**

Graham Allison, founding dean of Harvard's John F. Kennedy School of Government and Director of the Belfer Center for Science and International Affairs. He was Assistant Secretary of Defense in the first Clinton Administration, The American Prospect, March 2005, p. 48

First, it has made an important conceptual advance in recognizing that the gravest danger lies in what Vice President Dick Cheney termed the "nexus between terrorists and weapons of mass destruction"-terrorists armed with nuclear weapons. It rightly rejected a status quo that let terrorists and weapons-of-mass-destruction threats hide behind a shield of state sovereignty. It employed the full spectrum of American military power to topple the Taliban in Afghanistan and deny terrorists sanctuary anywhere in the world. And it has been prepared to revise traditional Cold War policies of deterrence and containment in those cases where they are no longer sufficient. Deterrence, which discouraged other states from launching a nuclear attack on the United States through the threat of overwhelming retaliation, is less applicable to suicide bombers or terrorists with no return address.

### **PREVENTION ONLY EFFECTIVE WAY TO STOP TERRORISM – DETERRENCE STRATEGIES FAIL**

Sherry Colb, Professor Rutgers Law School, October 10, 2001, "The new face of racial profiling: how terrorism affects the debate," <http://writ.news.findlaw.com/colb/20011010.html>

Unlike ordinary criminal activity, terrorism cannot be addressed primarily by "solving" acts of terrorism after the fact. Punishing offenders, though desirable from a retributive perspective, will not stop most future acts of terrorism. The prospect of a prison term or a lethal injection is unlikely to deter any aspiring suicide bomber. As a result, discovering terrorist missions at the inchoate stage, prior to harm, becomes a matter of great urgency. Among the many issues that may accordingly emerge is whether police, in the fight against terrorism, will be allowed to engage in racial profiling. The issue is hardly a new one, but a number of considerations may alter the terms of the debate.



## **Law Enforcement Framework Good: Most Effective**

### **TERRORISM MOST EFFECTIVELY COUNTERED AS A LOCAL LAW ENFORCEMENT MATTER**

Stephen Schulhofer, law professor, New York University, Journal of Criminal Law & Criminology, Spring 2011, p. 365-6

These new threats give local law enforcement increased prominence, but its importance is now acknowledged even in connection with dangers emanating abroad. A recent RAND Corporation report, drawing from global counterterrorism experiences, notes that terrorism is largely a policing problem, not a military matter, because local police are best able to build relationships with the communities in which terrorists try to hide and recruit members. The report urges police to "actively encourage and cultivate cooperation by building stronger ties with community leaders ... ." Another RAND report observes that "state and local law enforcement agencies ... may be uniquely positioned to augment federal intelligence capabilities by virtue of their presence in nearly every American community [and] their knowledge of local individuals and groups ... ." These conclusions are consonant with a broader stream of thought that understands global terrorism as a form of "insurgency" most easily defeated by winning the loyalty of the communities in which terrorists may be found. Even in foreign theaters of military operation, heavy firepower, though still favored by some, is increasingly de-emphasized in favor of at least partial reliance upon measures akin to domestic policing. Local police thus play a crucial role by virtue of their familiarity with neighborhoods and their ability to elicit information held within domestic communities. And with counterterrorism as with policing against conventional crime, community cooperation is essential if the police are to perform this role successfully. Moreover, as with traditional policing, cooperation cannot be taken for granted. Indeed, cooperation may be even more fragile in the context of counterterrorism than in ordinary law enforcement: Law-abiding members of the relevant community, though unswervingly loyal to the United States, know that cooperation could mean exposing people with whom they share close ethnic and religious ties to unusually harsh procedures and sanctions. Shaping sound policy to navigate these sensibilities is thus vitally important but exceptionally delicate.

### **LAW ENFORCEMENT AGAINST CITIZENS AND NON-CITIZENS BEST WAY TO PREVENT TERRORISM**

Jennifer Chacon, law professor, University of California, 2011, National Security, Civil Liberties, and the War on Terror, ed. Katherine Darmer and Richard Fybel, p. 255

The best way to prevent acts of terrorism against the United States by people present on U.S. soil is through criminal investigations and detentions of both citizens and non-citizens alike. Such investigations and detentions are necessarily governed by constitutional criminal procedural constraints. Of course, such investigations require resources, and many of those resources are currently allocated to fund the investigation, detention and removal of non-citizens who have run afoul of the immigration laws in any one of dozens of ways.

### **CRIMINAL FRAMEWORK MUCH MORE EFFECTIVE AND LEGITIMATE THAN MILITARY FRAMEWORK**

Alex J. Bellamy, International Relations Professor-University of Queensland, 2008, Fighting Terror: Ethical Dilemmas, p. 50-1

We need to begin by noting that war is not an inevitable response to terrorism. Indeed, a much more common, less costly and often more successful approach is to tackle it by using criminal justice. Although the US resorted to war, the UK responded to the 7/7 attacks on London in the same way that Spain responded to the Madrid bombings – by seeing terrorism as a criminal offense and using the criminal justice system to punish the perpetrators. Approaching terrorism in this way has several important advantages over waging war. Not only is it more effective in bringing terrorists to justice, it is also much more legitimate, precise and cost effective. I noted in chapter I that an effective "war on terror" has to be a legitimate one, lest it inadvertently create more terrorists. The best way of ensuring this is to see terrorism, not as an act of war, but as a criminal justice problem. Doing so would rob political leaders of the popular lexicon of war but it would make for a more effective long-term counter-terrorism strategy. After all, non state terrorists of the Al Qaeda type have never actually toppled democratic governments and nor is there much likelihood of them doing so. As such, it would seem to make little sense to tackle terrorism through the prism of war. In addition, as the nineteenth-century Prussian strategist Carl von Clausewitz teaches us, war is an unpredictable and uncontrollable phenomenon. Once unleashed, it is difficult to control its course and impossible to account for its unforeseen and unintended consequences. War takes on its own logic of escalation that makes it a particularly unsuitable means for achieving precise ends.

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There is a further reason why seeing terrorism as a criminal justice problem is preferable to viewing it as a war. “War,” commonly understood, is a violent confrontation between two entities that enjoy certain rights. Combatants in wars are protected by the laws of war and acquire a certain degree of legitimacy. No matter how hard governments try to prevent it by, for example, inventing new legal categories such as “illegal combatants,” waging war on terrorists confers a degree of legitimacy upon them. It would be much better, therefore, for liberal democratic governments to pursue terrorists through the criminal justice system than through war.

**EFFECTIVE LAW ENFORCEMENT VITAL COMPONENT TO THE MILITARY EFFORT TO PREVENT TERRORIST ATTACKS—JUSTIFIES MODIFYING LAW ENFORCEMENT TOOLS**

Paul Rosenzweig, Senior Legal Research Fellow, Heritage Foundation, 2004, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 679-81

As should be clear from the outline of the scope of the problem, the suppression of terrorism will not be accomplished by military means alone. Rather, effective law enforcement and/or intelligence gathering activity are the key to avoiding new terrorist acts. Recent history supports this conclusion. In fact, police have arrested more terrorists than military operations have captured or killed. Police in more than 100 countries have arrested more than 3,000 al Qaeda linked suspects, while the military has captured some 650 enemy combatants. Equally important, it is policing of a different form - preventative rather than reactive, since there is less value in punishing terrorists after the fact when, in some instances, they are willing to perish in the attack. The foregoing understanding of the nature of the threat from terrorism helps to explain why the traditional law enforcement paradigm needs to be modified (or, in some instances, discarded) in the context of terrorism investigations. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. All lawyers have heard one or another form of the maxim that “it is better that 10 guilty go free than that 1 innocent be mistakenly punished.” This embodies a fundamentally moral judgment that when it comes to enforcing criminal law, American society, in effect, prefers to have many more Type II errors (false negatives) than it does Type I errors (false positives). That preference arises from two interrelated grounds: one is the historical distrust of government that, as already noted, animates many critics of the Patriot Act. But the other is, at least implicitly, a comparative valuation of the social costs attending the two types of error. We value liberty sufficiently highly that we see a great cost in any Type I error. And, though we realize that Type II errors free the guilty to return to the general population, thereby imposing additional social costs on society, we have a common sense understanding that those costs, while significant, are not so substantial that they threaten large numbers of citizens or core structural aspects of the American polity.

**LAW ENFORCEMENT ONLY EFFECTIVE WAY TO FIGHT INTERNATIONAL TERRORISM**

Walter Gary Sharp, MITRE Corporation, Principal Information Security Engineer, War on Terrorism, ed. Alan O’Day, 2004, p. 172

Nevertheless, despite the practical difficulties of multi-jurisdictional efforts to investigate, identify, capture, and prosecute international terrorists, when states cooperate in good faith the only appropriate and legal response to non-state-sponsored international terrorism is domestic law enforcement. Such a law enforcement response permits a state to rely upon its military or intelligence capabilities to discharge its law enforcement responsibilities, but it must do so consistent with the international law obligations that define the character of a law enforcement response.

**LAW ENFORCEMENT FRAMEWORK BEST EVEN FOR HORRIFIC TERRORIST ATTACKS**

Walter Gary Sharp, MITRE Corporation, Principal Information Security Engineer, War on Terrorism, ed. Alan O’Day, 2004, p. 178

Even horrific acts of international terrorism committed by non-state actors remain a law enforcement issue. Despite what their destructive effects may be, acts of international terrorism committed by non-state actors do not constitute a use of force within the meaning of the law of conflict management. Similarly, the ineffectiveness and practical difficulties of law enforcement arrangements among cooperative states to address the problem of international terrorism do not change a crime to a use of force or the basic nature of the legal issues. In the absence of any state sponsorship of the sovereign territory of another state without that state’s consent may very likely be an unlawful use of force against that territorial state.

**MILITARIZATION FRAMEWORK FOR COMBATTING TERRORISM FUNDAMENTALLY WRONG—SHOULD BE TREATED AS A CRIMINAL MATTER**

Harvey Rishikof, Law Student, Suffolk Journal of Trial & Appellate Advocacy, 2003, 8 Suffolk J. Trial & App. Adv. 1, p. 16-7

Finally, critics argue that the analogy of war is fundamentally the wrong framework in which to fight and prosecute terrorism. For these critics the appropriate forum is federal criminal court. The argument is composed of two parts. The first line of logic is that Congress has already legislated in this area and created

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a series of statutes to prosecute and define terrorism as a federal crime: for example, the 1984 Act to Combat International Terrorism, <sup>n64</sup> the Antiterrorism Act of 1990, <sup>n65</sup> the Anti-Terrorism and Effective Death Penalty Act of 1996, <sup>n66</sup> and, most recently, the USA Patriot Act. <sup>n67</sup> In particular, the Antiterrorism Act of 1990, includes all "persons" whether U.S. citizens or not. This Act also anticipates that the terrorist acts will "transcend national boundaries," and therefore it criminalizes any violent action intended to intimidate or coerce a civilian population or alter the policy of a government, or affect the conduct of government by assassination. <sup>n68</sup> Stated another way, until Congress delegates this power clearly to the President, the federal courts are the appropriate forum. The second prong of the argument rests on the successful prosecutions for the 1993 bombing of the World Trade Towers, the Oklahoma federal building attack, and the current prosecutions of John Walker Lindh, Richard Reid (the shoe bomber), and Zacarias Moussaoui. <sup>n69</sup>

## **Law Enforcement Framework Good: Only Practical Option**

### **NO REASONABLE ALTERNATIVE TO TREATING TERRORISTS AS CRIMINALS**

David C. Rapoport, **Political Science Professor-UCLA, 1982**, *The Morality of Terrorism: Religious and Secular Justifications*, ed. D. Rapoport & Y. Alexander, p. 223-4

Dugard observes that international agreements are difficult to achieve because some states want to support terrorist activity and because terrorists so often refuse to accept the obligations that soldiers assume. Nonetheless, Dugard thinks we ought to persist in this effort. Wilkinson cites additional obstacles. The first is that in wars between states the rules are broken regularly, a tendency that necessarily increases as modern technology produces weapons that are more indiscriminate; therefore, efforts to make terrorists abide by conventions which states themselves do not honor in war cannot be morally credible. Secondly, in international law, individual parties bear primary responsibility for enforcing the rules against their own members; but only large and stable organizations like armies can develop adequate discipline, and few if any terrorist groups can meet this condition. Third, rebels now know they can exploit atrocities, and in the foreseeable future the technology available to them will encourage this tendency. In this respect it is significant that although the rules of war have been recently modified to make it easier for terrorists to become guerrillas thereby gaining rights they say they want, few in fact have accepted the opportunities provided. There simply is no reasonable alternative to treating terrorists as we normally do, as though they really are ordinary criminals.

### **CRIMINAL FRAMEWORK FOR TERRORISM CONSISTENT WITH DEMOCRATIC LIBERAL TRADITION**

Peter Chalk, **Department of Government, University of Queensland**, *War on Terrorism*, ed. Alan O'Day, **2004**, p. 86-7

Characterizations of counter-terrorism typically fall into one of two categories. First, there is the criminal justice model. Here terrorism is viewed as a crime with the onus of response placed squarely within the bounds of the state's criminal legal system. Second there is the military model. Here terrorism is viewed as an act of revolutionary warfare with the onus of response placed on the military and entailing the use of retaliatory strikes, campaigns of retribution and troop deployment. The typical approach adopted by liberal democratic states is to treat terrorism as a crime where punishment takes place within its system of criminal law. In other words, its response conforms to the criminal justice model of counter-terrorism. Most liberal democratic states are reluctant to adopt the war model of counter-terrorism, largely because the powers of the army in a civilian context tend to be ill-defined and could well place soldiers in positions of personal authority which would be likely to have serious implications for civil liberties. As a result, military resources are used as a last resort, only to be employed in times of extreme civil unrest or emergency.

### **TERRORISM SHOULD BE TREATED AS A LAW ENFORCEMENT MATTER—NOT SUBJECT TO LAWS OF WAR**

Amnesty International, USA, *Guantanamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*, May 13, **2005**, <http://web.amnesty.org/library/Index/ENGAMR510632005>

The leading authority on provisions of international humanitarian law, or the law of war, is the ICRC which has stated:

"Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war... 'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'... What is important to know is that no person captured in the fight against terrorism can be considered outside the law. There is no such thing as a 'black hole' in terms of legal protection."(110)

## **Military Framework Best**

### **PRACTICAL PROBLEMS WITH CRIMINAL RESPONSE LEGITIMIZE MILITARY FRAMEWORK**

Daniel Statman, **Philosophy Professor University of Haifa, 2005**, *Philosophy 9/11: thinking about the war on terrorism*, ed. T. Shanahan, p. 188-9

The second condition mentioned above for regarding a situation as war rather than as a law-enforcement operation – namely, the impracticality of coping with the threat by means of conventional law-enforcing institutions and methods – is met in the case of the US campaign against Al Qaeda as well as in the case of the Israeli struggle with the Palestinian terror organizations. The proposition that Al Qaeda members could be prevented from carrying out further terror attacks by issuing an arrest order to the governments harboring them, is, at best, naïve, and the same is true with regard to the thousands of Palestinians involved in planning and executing murderous actions in Israel. Things might have been different had the Palestinian Authority and its police cooperated with Israel in capturing the criminals and bringing them to justice. But this, of course, is pure wishful thinking. The Palestinian Authority not only refrained from arresting terrorists and, in general, from taking action against terror; it actually supported it in various ways.

### **PROBLEMS WITH THE LAW ENFORCEMENT MODEL JUSTIFY LETHAL FORCE AGAINST SUSPECTED TERRORISTS**

Major Matthew J. Machon, **US Army, 2006**, *Targeted Killing as an Element of US Foreign Policy in the War on Terror*, [www.fas.org/irp/eprint/machon.pdf], p. 41

Once again, the interpretation of the various human rights conventions and examination of case law provides no clear consensus concerning a state's use of lethal force. Kretzmer acknowledges there are three possible approaches to determining when a state may employ lethal force against suspected terrorists:

1. To thwart an imminent attack. Absent imminency, pre-emptive targeting of suspected a terrorist will be regarded as not being absolutely necessary, or as an arbitrary deprivation of life, no matter how strong the evidence he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks.
2. Allowing the targeting in very narrow circumstances in which apprehending or arresting the suspected terrorist is not feasible, provided there is extremely strong evidence that the suspected terrorist is involved in executing or planning a terrorist attack.
3. Positing that the law-enforcement model...does not provide an adequate answer to the issue of trans-national terror. When the terror is intense, organized and protracted, the appropriate model should be the armed conflict model.

### **TERRORISTS HAVE HISTORICALLY ASKED TO BE TREATED IN A MILITARY FRAMEWORK**

David C. Rapoport, **Political Science Professor-UCLA, 1982**, *The Morality of Terrorism: Religious and Secular Justifications*, ed. D. Rapoport & Y. Alexander, p. 223

While Gerstein reflects on the moral principle that ought to shape our legal rules, Wilkinson's primary interest is in the very important question of whether the domestic or international legal system should have jurisdiction. Ever since the 19<sup>th</sup> century, most captured terrorists have claimed that we have no right to try them in national criminal courts because they are soldiers, and as such their rights should be respected in accordance with the rules of war, as those rights are defined by international law. The claim has troubled many thoughtful observers who wonder what would happen if we considered it seriously. Could the public ever gain by attempting to "civilize" violence? Wilkinson's response is emphatically no, and it differs from those suggested in two earlier chapters, that of Gregor and especially the one by Dugard.

### **TERRORISTS SHOULD NOT BE TREATED AS "INNOCENT NONCOMBATANTS" DESPITE THE AMBIGUITY OF THEIR STATUS**

Michael L. Gross, **International Relations Professor University of Haifa, 2007**, *War, Torture and Terrorism: ethics and war in the 21<sup>st</sup> century*, ed. D. Rodin, p. 82-3

Are named killings justified?

Answering this question largely depends upon how one views the status of terrorists, the nature of the reigning paradigm, and the conditions that belligerents must meet before undertaking a named killing. At one extreme, many human rights groups maintain that terrorists do not enjoy combatant status. "Armed Palestinians are not combatants according to any known legal definition," writes Yael Stein, or B'tselem, The Israeli Information Center for Human Rights in the Occupied Territories: "They are civilians – which is the only legal alternative – and can only be attacked for as long as they actively participate in hostilities." Stein's remarks highlight the problem of shifting identity that plagues the definition of combatant. It seems that terrorists maintain two statuses. On the battlefield, they are something like

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combatants; off the battlefield and at the time they are targeted they are something like civilians or some other form of noncombatant. I will return to this issue later. For now, it is important to see where the noncombatant paradigm leads. Noncombatants are, generally, innocent of any wrongdoing. The conventions of war and the laws of armed conflict protect them from unnecessary harm or murder, and prohibit belligerents from killing or otherwise harming noncombatants unless necessary and unavoidable to achieve important military goals. These conditions are inherent in the idea of collateral damage and the double effect. However, collateral damage only pertains to harm that befalls *innocent* noncombatants. Terrorists, however ambiguous their status, assume something like combatant status when they take up arms and fight. It stands to reason that they remain non-innocent once they have left the battlefield.

From any informed perspective, they are not, as some human rights advocates seem to suggest, civilians who occasionally and only marginally contribute to armed struggle. On the contrary, they maintain their hostile status off the battlefield as they prepare for battle, lay plans, tend to their weapons and maintain their fighting capability. At the same time, there is good cause to suspect that terrorists are guilty of war crimes and criminal activity.

## **Military Framework Most Effective**

### **MILITARY VIOLENCE ONLY EFFECTIVE RESPONSE TO TERRORISM**

Brent Kessler, *Philosophy Professor-United States Military Academy, 2005*, *Philosophy 9/11: thinking about the war on terrorism*, ed. T. Shanahan, p. 170

First, recall that I am not arguing that we have to respond with violence, only that we can; that the use of armed force in response to terrorism can be justified. Second, given the way the world is constructed, the use of armed force is often the only way to respond to international terrorism. The structure of our international arena is such that crimes, acts of war, acts of terrorism, and any violations of international law, for that matter, are difficult if not impossible to enforce without the use of the armed force of one country or another. There is no such thing as an international police force analogous to a police officer apprehending a criminal in the domestic analogy I used earlier. So, military force in response to international terrorism, if a response is to be made, is often the only and therefore necessary option. The complete idea, then, is that because international terrorism is a particular sort of illegitimate violence that occurs within the international arena constructed as it is, and because illegitimate violence can be legitimately resisted, a military response to international terrorism can be legitimate as long as the decision to use military force and the force itself does not dismiss the universal rules of interaction that our shared humanity generates.

### **PREVENTION VITAL TO STOPPING TERRORISM**

Tracey Topper Gonzalez, *Clerk to Richard Eaton, US Court of International Trade, 2003*, *International and Comparative Law Review*, 11 U. Miami Int'l & Comp. L. Rev. 75, p. 103-4

As is true for other types of crimes, prevention is the key to stopping terrorist attacks. Plots must be discovered and thwarted before they can be carried out. Prevention is especially important in the context of terror, however, since terror attacks tend to be of a larger scale and more random occurrence than other crimes,<sup>n180</sup> and are specifically geared toward causing widespread panic and fear.<sup>n181</sup> Moreover, routing out terrorists presents a special challenge for law enforcement, as many terrorists are "well-entrenched, sophisticated, and often shrouded in a veil of legitimacy" (such as operating under the camouflage of purportedly charitable or humanitarian activity)."<sup>n182</sup>

### **“WAR” FRAMEWORK FOR TERRORISM PUTS EMPHASIS ON PREVENTION**

George C. Harris, *Attorney, 2003*, *Loyola of Los Angeles International & Comparative Law Review*, 26 Loy. L.A. Int'l & Comp. L. Rev. 31, p. 32

It is the opinion of some, and apparently the prevailing view in the current Administration, that our ordinary criminal justice system is not adequately equipped to cope successfully with the current threat of terrorism.<sup>n5</sup> As a result, the Administration's anti-terrorism effort has moved from a criminal justice model to a war model, with the emphasis on prevention rather than conviction or punishment. One aspect of this approach has been to assert executive discretion to detain terrorism suspects without criminal charges under the President's war power. In the Executive's view, it has at least three strategic options to deal with suspected terrorists: (1) to detain the suspected terrorist in military custody as an "enemy combatant" indefinitely without judicial review (e.g. in the Hamdi, Padilla and Al-Marri cases), (2) to bring charges and try non-citizen suspects in military tribunals (as will apparently be done to some of the Guantanamo detainees),<sup>n6</sup> or (3) to charge the suspect in federal court and treat the suspect as an "unlawful enemy combatant" not entitled to normal protections of international law (e.g. the Lindh case).

### **PREVENTION ONLY WAY TO REDUCE TERRORISM**

*The Georgetown Journal of Law & Public Policy*, Winter, 2002, 1 Geo. J.L. & Pub. Pol'y 131, p. 131-2

[\*131] The terrorist attacks of September 11 revealed several realities about international terrorism in the twenty-first century. First, the communication technology available today, while making life more convenient for Americans, makes it easier and less expensive for terrorists to plan, coordinate, and carry out attacks; other technologies, such as skyscrapers and jumbo jets, make the toll of such attacks unacceptably high. Second, terrorists operate across state and national borders, often aided by technology. Third, terrorists maintain virtually hermetic operational security, rendering traditional, non-intrusive investigative techniques insufficient to penetrate their operations. Finally, many terrorists are willing to die for their cause and to kill innocent civilians, making disruption and prevention of specific acts the only effective means of eliminating terrorism. The synergy of these factors makes terrorism one of the most serious threats to national security. The USA PATRIOT Act was an attempt by Congress to respond to these harsh realities.

### **KEY MISSION IN WAR ON TERRORISM IS PREVENTION**

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Robert S. **Mueller, III, Director, FBI, 2003**, Stanford Journal of International Law, 39 Stan. J Int'l L. 117, p. 120

Another part of that battle is being waged on the intelligence side of the house. We are often called a law enforcement agency, but we are called upon, in addressing terrorism, to be an intelligence agency as well and to develop ties with other intelligence agencies in this country and our counterparts, both here and overseas. Every morning since September 11, CIA Director George Tenet and I brief the President on what has happened in the last twenty-four hours in this country with regard to the war on terrorism. The President does not ask and has not asked, "how many indictments have you returned?" or "how many people have been arrested?" He asks both George and I what has been done in the last twenty-four hours to protect this country against terrorism.

And so for us as an institution, and for the CIA, it comes from the top. Our mission is to prevent another terrorist attack. And critical to our response is our ability to share essential information throughout the FBI and throughout the rest of the government, including the CIA, the DIA, other federal agencies, as well as state and local law enforcement agencies. I will say that the thought of regularly sharing Bureau information is something that J. Edgar Hoover would likely have resisted, and he may well be turning around in his grave to understand the extent to which, since September 11, there has been an interchange of information between ourselves and the CIA.



## **Military Framework Most Appropriate for Terrorist Threat**

### **CAN'T REDUCE WAR TO A TRIAL-LIKE FORUM**

**Former Attorneys General of the US, et al, Amici Brief, Rasul v Bush, 2003 U.S. Briefs 334, March 3, 2004, p. 17**

War is necessarily rife with uncertainties that cannot be reduced to a particular quantum of proof in a trial-like forum. Even a small risk that a person confronted on the battlefield is a threat may justify coercive military action--even lethal action--where the potential harm is great. In such circumstances, the Commander-in-Chief and his military subordinates may conclude that any mistake from failure to act would have such grave consequences that they must adopt a sweeping approach that exposes persons who may be "not guilty," in the sense that term is used in our criminal law, to coercive military force. n9

### **SEPTEMBER 11 ATTACKS MORE LIKE PEARL HARBOR THAN A MERE CRIMINAL ACT**

**Donald Downs & Erik Kinnunen, Professor and Law Student, University of Wisconsin, Wisconsin Law Review, 2003, 2003 Wis. L. Rev. 385, p. 399-400**

To understand our third model, we must first come to terms with the events of September 11 and recognize them for what they were. We believe that what happened that fateful day was more akin to an act of war, like Pearl Harbor, than a mere criminal act. As Ruth Wedgwood observed, "the attacks mounted by the Al Qaeda organization on September 11, 2001, were of unprecedented scale, heretofore seen only in wartime, killing three thousand people in a few hours' time." n94 Indeed, al Qaeda has publicly declared war upon the United States, and the United States has reacted by waging a military campaign against the Taliban in Afghanistan. The U.N. Security Council "declared unanimously that an armed attack had occurred on American soil ... and that the United States had the right to use armed force in self-defense." n95 Moreover, NATO declared that the attacks were an act of war if it was found that they had been "directed from abroad." n96 In addition to the attacks on September 11, al Qaeda has been involved in previous attacks against America, including: The 1993 truck bombing of the World Trade Center[,] ... the 1995 bombing of the Riyadh training center in Saudi Arabia[,] the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia[,] ... the 1998 destruction of two American embassies in East Africa[,] and the bombing of the U.S.S. Cole ... [and] a planned millennium attack at Los Angeles Airport. n97

## **Law Enforcement Framework Bad: Ineffective**

### **LAW ENFORCEMENT MODEL RISKS THE LIVES OF MANY INNOCENT PEOPLE**

**Major Matthew J. Machon, US Army, 2006, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [www.fas.org/irp/eprint/machon.pdf], p. 39-40**

One of the inherent flaws with the law enforcement model in relation to its application to trans-national terror is that one of the fundamental premises is invalid: that the suspected terrorists are within the jurisdiction of the law-enforcement authorities of the victimized state.

The law enforcement model is often resisted by the military based upon the realization that attempting to arrest terrorists can prove prohibitively costly in terms of human life. The 3 October 1993 raid to apprehend Somali warlord Mohammed Farrah Aidid in Mogadishu, chronicled in the book and portrayed in the movie Black Hawk Down, illustrates some of the potential dangers inherent with the application of the law enforcement model. The intent of the operation was, in accordance with U.N. Resolution 837, to “use all necessary measures to arrest and detain” Aidid and others responsible for the deadly ambush of Pakistani peacekeepers of 5 June 1993, and present them for “prosecution, trial, and punishment.” In the aftermath of the raid 18 Americans lost their lives while Somali losses numbered 500–1,000 killed, with total casualties probably running over 5,000. Attempting to execute the arrest of a suspect in hostile territory may, as in this instance, lead to tremendous collateral damage and loss of life that might have been avoided through the application of a precision strike. The dilemma of course is that while such a strike may potentially spare the lives of others, the target is clearly deprived of his right to life.

### **MANY PRACTICAL PROBLEMS WITH LAW ENFORCEMENT MODEL**

**Major Matthew J. Machon, US Army, 2006, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [www.fas.org/irp/eprint/machon.pdf], p. 40-1**

Other potential difficulties with the law enforcement model include the “unusual, and at times insurmountable obstacle to indicting them.” The ability to build an overwhelming case against a suspected terrorist capable of proving guilt beyond a reasonable doubt is particularly arduous. Proving a suspects identity, affiliation with a particular organization, and direct responsibility for specific actions in accordance with the strict legal procedures of the criminal justice system remain particularly uncertain. Suspects in custody pose additional problems for the states holding them. Juries and witnesses may be intimidated by the terrorist organization, making trial and conviction still more problematic. The detention of terrorist suspects may also lead to further terrorist attacks or the seizure of hostages as a means to obtain their release.

What recourse is available to victim states when suspected terrorists are in the territory of another sovereign state and that state is either unwilling or incapable of detaining these suspected terrorists? In

“Targeted Killing” Daniel Statman claims that the United States is entitled to classify operations against al-Qaeda as war.

“with the loosening of various moral prohibitions implied by such a definition, rather than a police-enforcement action aimed at bringing a group of criminals to justice based upon two specific criteria: (a) the gravity of the threat posed by al Qaeda and (b) the impracticality of coping with this threat by conventional law-enforcing institutions and methods.”

The Inter-American Commission on Human Rights Report on Terrorism and Human Rights in 2002 appears to agree with the assessment of Statman. The text of the report accepted the use of lethal force by state agents “in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.”

### **LAW ENFORCEMENT MODEL FAILED AGAINST TERRORISTS**

**Major Matthew J. Machon, US Army, 2006, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [www.fas.org/irp/eprint/machon.pdf], p. 41-2**

One popular argument among scholars is that “when terrorists operate outside the scope of an armed conflict, then they are not combatants that can be killed on sight, but criminals that should be arrested and brought to justice.” The United States, however, has generally adhered to the third approach, resorting to the application of proportional military force in response to threats to its citizens and security. Throughout history “the United States has employed military force whenever another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory.” Through the early 1990’s the United States attempted to apply the law enforcement model against terrorists, bringing to trial those accused of perpetrating the 1993 World Trade Center bombing. These measures, however, were met with an increasing frequency and severity of attacks directed upon U.S. citizens and government installations worldwide. These methods have only led to the arrest and conviction of the lowly foot soldiers directly responsible for the attacks. Meanwhile, those principally

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responsible for motivating, resourcing, and training, bin Laden and other terrorist leaders for example, free to continue planning future attacks.

### CRIMINAL TRIALS INAPPROPRIATE FOR FOREIGN TERRORISM SUSPECTS

**American Center for Law & Justice et al**, Amici Brief, *Rasul v Bush*, 2003 U.S. Briefs 334, March 3, 2004, p. 19

It is a system, in other words, that fundamentally treats crime as a deviation from the domestic legal order, not fundamentally an attack upon the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. --- U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals and enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11. (emphasis in original)).

### MANY STRATEGIC PROBLEMS WITH TREATING TERRORISM AS A DOMESTIC CRIMINAL LAW ISSUE

**Donald Downs & Erik Kinnunen, Professor and Law Student, University of Wisconsin**, Wisconsin Law Review, 2003, 2003 Wis. L. Rev. 385, p. 400-1

Together, these acts of aggression unmistakably bear the characteristics of war. They are not, however, the only reasons for treating them accordingly.

There are several strategic problems associated with treating the battle on terrorism as a traditional domestic criminal law issue. In its decision in *Hamdi III*, the Fourth Circuit Court of Appeals reversed the district court's order that required the government to produce exhaustive information pertaining to Yaser Esam Hamdi's capture in Afghanistan as a combatant and his subsequent transfer to the United States. n98 In rejecting this claim, the court laid out a broad range of reasons why normal judicial process was an inappropriate way to deal with Hamdi's claim that he was being held improperly:

Once again ... litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the case even further is the fact that Hamdi was originally captured by Northern Alliance forces ... . The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime... . In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. n99

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**\*\*\*AFFIRMATIVE\*\*\***

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**\*Limiting Due Process to Citizens is Bad\***

## **US Has Treated Citizens Accused of Terrorism Differently From Non-Citizens**

### **US HAS TREATED SUSPECTED TERRORISTS DIFFERENTLY BASED ON CITIZENSHIP STATUS**

Tung Yin, **Professor of Law-Lewis & Clark, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 104

Though the Bush administration never clearly explained its decisions to classify enemy fighters as criminal defendants or as enemy combatants, it appears that, with a notable, early exception, American citizens suspected of terrorist links to al Qaeda have been prosecuted in federal court for terrorism-related offenses, regardless of their place of capture. For noncitizens, on the other hand, place of capture has, again with a few exceptions, proven to be the determinative factor in their classification; those captured outside the United States were detained in Afghanistan or at Guantanamo Bay, while those captured within the United States have been prosecuted in federal courts.

### **BUSH POLICY CEMENTED DIFFERENTIAL TREATMENT FOR CITIZEN/NON-CITIZEN TERRORISM SUSPECTS**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 225

The tribunals that Bush created departed significantly from prior practice. Under the terms of his military order, only noncitizens – including aliens residing in the United States—would be subject to the tribunals. They included members of al Qaeda, persons involved in “acts of international terrorism,” or persons who had “knowingly harbored” others in the first two categories. The singling out of noncitizens was a marked departure from the prior use of tribunals, which had never distinguished between citizens and aliens, between American soldiers or other nations’ POWs, or, for that matter, between Union soldiers and Confederate rebels during the Civil War. Tens of millions of aliens residing in the United States could now be tried in ways that differed from trials provided to citizens. For the first time in American history, the characterization of terrorism as a criminal act to be dealt with by the civilian courts would be superseded by its characterization as an act of war. The tribunals could try individuals who had not been apprehended on a traditional battlefield; in the war on terror the government assumed that all of the United States was on the front lines.

### **FOURTH AMENDMENT PROTECTIONS NOT APPLIED TO NON-CITIZENS IN THE SAME WAY AS CITIZENS**

Jennifer Chacon, **law professor, University of California, 2011**, National Security, Civil Liberties, and the War on Terror, ed. Katherine Darmer and Richard Fybel, p. 252

While recognizing certain constitutional protections for non-citizens in criminal proceedings, the Court has also imposed significant limitations upon these protections. The Court has sometimes recognized the non-citizen's right to the Fourth Amendment protections against unreasonable searches and seizures, but has also indicated that the right only applies to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. This language leaves open the possibility that non- citizens can be searched and detained without Fourth Amendment protections, even in criminal proceedings. Nevertheless, until recently, when state and federal government officials have subjected a non-citizen to the criminal law, they have provided those non-citizens with many of the same protections due to citizens, in spite of their citizenship status. The increasing reliance on immigration enforcement to achieve security objectives undercuts these protections. The due process rights available to non- citizens in criminal proceedings do not extend to removal proceedings. It is true that some form of due process is required in removal proceedings, but the process is not as protective as the process guaranteed by the U.S. Constitution to those in criminal proceedings. This is true despite the apparently punitive nature of certain removal proceedings because the courts have long maintained a legal distinction between removal and criminal punishment.

### **POST 9-11 SECURITY MEASURES SIGNICANTLY INTRUDE ON LIBERTY OF NON-CITIZENS**

Elizabeth M. McCormick, **William R Davis Clinical Fellow-University of Connecticut School of Law**, Connecticut Journal of International Law, Spring, **2004**, 19 Conn. J. Int'l L. 423, p. 425-6

The disproportionate burden borne by non-citizens since September 11 in exchange for enhanced security is beyond cavil. Non-citizens have been subjected to interviews, registration, automatic detention, and removal. They have been tried in secret and subjected to lengthy and coercive interrogation without benefit of counsel. They have been excluded or removed from the United States based on speech or wholly

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innocent political associations. They have been subjected to indefinite detention on the whim of the Attorney General. These "security measures" were the subject of little protest, Cole argues, because they were aimed at non-citizens. Where the government, on the other hand, has taken steps to enhance security that would have had a broad impact on the liberties of United States citizens, the response has been entirely different. n10 Indeed, though many Americans expressed a willingness after September 11 to sacrifice civil liberties for more security, the sacrifices demanded so far have been primarily from non-citizens, and Cole offers example after shameful example of how the war on terror has been waged largely through measures targeting foreign nationals.

#### **WAR ON TERRORISM SELECTIVELY SACRIFICES LIBERTY OF NON-CITIZENS**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 954-5

The difference between the treatment afforded John Walker Lindh and his fellow Taliban and Al Qaeda prisoners held on Guantanamo rested on the fact that Lindh was, as the press nicknamed him, "the American Taliban." When the Attorney General announced the charges against Lindh, a reporter asked why Lindh was being tried in an ordinary criminal court rather than before a military tribunal. The Attorney General explained that because Lindh was a United States citizen, he was not subject to the military tribunals created by President Bush's order. n7 As a purely legal matter, the president could have made U.S. citizens subject to military commissions; citizens have been tried in military tribunals before, and the Supreme Court expressly upheld such treatment as recently as World War II. n8 But the president chose to limit his order to noncitizens.

That choice is emblematic of how we have responded to the terrorist attacks of September 11, 2001. While there has been much talk about the need to sacrifice liberty for a greater sense of security, in practice we have selectively sacrificed noncitizens' liberties while retaining basic protections for citizens. It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens' liberties are the first to go. The current war on terrorism is no exception.

#### **MILITARY ORDER OF NOVEMBER 2001 DISTINGUISHES BETWEEN CITIZENS AND NONCITIZENS**

Harvey Rishikof, Law Student, Suffolk Journal of Trial & Appellate Advocacy, 2003, 8 Suffolk J. Trial & App. Adv. 1, p. 4

Additionally, the Military Order of November 13, 2001 was specifically restricted to the "detention, treatment, and the trial of certain non-citizens in the war against terrorism." n12 The Bush Administration clearly made a sharp distinction between citizens and non-citizens since the process contemplated for detention, treatment, and trial would not be governed by the rules and procedures accorded in federal court. As events began to unfold in the investigation, however, U.S citizens were accused of having been involved in the September 11 attack and were brought to federal court rather than the military commissions. These cases have generated a series of legal issues for the federal trial courts and have forced those courts to confront the Bush Administration on the procedures to be followed when trying citizens as terrorists. n13 Conversely, non-citizen detainees, under the same military order who objected to the terms of their confinement in Cuba, have attempted to seek legal redress but were rebuffed and suspended in a "legal-limbo." n14

## **Detainees Denied Due Process Protections Now**

**DESPITE OBAMA'S INITIAL CRUSADE ON TORTURE POLICY, BAGRAM AIR FORCE BASE IS STILL BEING EXPANDED, ENSURING THE VIOLATION OF DETAINEES CONTINUES UNSCRUTINIZED**

**AMBINDER**, POLITICS EDITOR FOR THE ATLANTIC, **2010** [MARC, THE ATLANTIC, INSIDE THE SECRET INTERROGATION FACILITY AT BAGRAM, MAY 14, [HTTP://WWW.THEATLANTIC.COM/POLITICS/PRINT/2010/05/INSIDE-THE-SECRET-INTERROGATION-FACILITY-AT-BAGRAM/56678/](http://www.theatlantic.com/politics/print/2010/05/inside-the-secret-interrogation-facility-at-bagram/56678/)]

The Defense Intelligence Agency (DIA) runs a classified interrogation facility for high-value detainees inside Bagram Air Field in Afghanistan, defense and administration officials said, and **prisoners there are sometimes subject to tougher interrogation methods than those used elsewhere.**

Both the New York Times and the BBC reported that prisoners who passed through the facility reported abuse, like beatings and sexual humiliation, to the Red Cross, which is not allowed access. The commander in charge of detention operations in Afghanistan, Vice Admiral Robert Harward, has insisted that all detainees under his purview have regular Red Cross access and are not mistreated.

It has been previously reported that the facility, beige on the outside with a green gate, was operated by members of a Joint Special Operations Command (JSOC) group, allegedly outside of Harward's jurisdiction. But JSOC, a component command made up of highly secret special mission units and task forces, does not operate the facility.

Instead, it is manned by intelligence operatives and interrogators who work for the DIA's Defense Counterintelligence and Human Intelligence Center (DCHC). They perform interrogations for a sub-unit of Task Force 714, an elite counter-terrorism brigade.

**Called the "black jail" by some of those who have transited through it, it is a way-point for detainees who are thought to possess actionable information about the Taliban or Al Qaeda.**

Intelligence gleaned from these interrogations has often led to some of the military's highest profile captures. Usually, captives are first detained at one of at least six classified Field Interrogation Sites in Afghanistan, and then dropped off at the DIA facility -- and, when the interrogators are finished, transferred to the main prison population at the Bagram Theater Internment Facility.

"DoD does operate some temporary screening detention facilities which are classified to preserve operational security; however, both the [Red Cross] and the host nation have knowledge of these facilities," said Bryan Whitman, a Pentagon spokesperson. "Screening facilities help military officials determine if an individual should be detained further and assists military forces with timely information vital to ongoing operations." Whitman would not say who ran the facility or provide any details. A DIA spokesperson declined to comment, as did the White House, which referred questions to the Pentagon.

~Under a directive issued by the commander of coalition forces in Afghanistan, Gen. Stanley McChrystal, those captured on the battlefield can be detained for only 96 hours unless they are deemed to possess intelligence value. In practice, military units can unofficially transfer detainees they pick up to other field units before they arrive at interrogation sites, giving American and Afghan interrogators more time to ferret out useful information.

According to other officials, personnel at the facility are supposed to follow the Army Field Manual's guidelines for interrogations. When he took office, President Obama signed an executive order banning the Central

Intelligence Agency and the military from using techniques not listed in the manual. But he has a task force studying whether the expressly manual-approved tactics are sufficient.

However, under secret authorization, the DIA interrogators use methods detailed in an appendix to the Field Manual, **Appendix M**, which spells out "restricted" interrogation techniques.

Under certain circumstances, interrogators can deprive prisoners of sleep (four hours at a time, for up to 30 days), to confuse their senses, and to keep them separate from the rest of the prison population. The Red Cross is now notified if the captives are kept at the facility for longer than two weeks.

When interrogators are using Appendix M measures, the Undersecretary of Defense for Intelligence, Gen. James Clapper (Ret.) is the man on the hook. **Detainees designated as prisoners of war cannot be subjected to**

### **Appendix M measures.**

The DCHC is a relatively new organization. It has several branches and has absorbed staff from the the now largely disbanded Strategic Support Branch, which provided CIA-like intelligence services to ground combat units. The DCHC also performs some of the work that the

Counterintelligence Field Activity (CIFA), which was accused of spying on American political groups, used to do. Many of the staff, civilian and military, as well as many contractors, previously worked with CIFA.

Defense officials said that the White House is kept apprised of the methods used by interrogators at the site. The reason why the Red Cross hasn't been invited to tour it, officials said, was because the U.S. does not believe it to be a detention facility, classifying it instead as an intelligence gathering facility.

A Defense official said that the agency's inspector general had launched an internal investigation into reports in the Washington Post that several teenagers were beaten by the interrogators, but Whitman disputes this.

When the Obama Administration took over, it forbade the DIA from keeping prisoners in the facility longer than 30 days, although it is not clear how that dictum is enforced. It is also not clear how



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much Congress knows about the DIA's interrogation procedures, which have largely escaped public scrutiny.

"In all our facilities the standard is humane treatment and all DoD detention facilities are required to be compliant with Common Article III, The Detainee Treatment Act, the Executive Order signed by the President last year, and the DoD Detainee Directive and the Army Field Manual," Whitman said.

Although the CIA's enhanced interrogation program was investigated and a Justice Department prosecutor is currently reviewing those files, the Defense Department's parallel activities have been given little scrutiny. To this day, the Department denies the existence of a "special access program," codenamed "Copper Green," which allegedly authorized military interrogators to use extremely harsh methods, including the infliction of sexual humiliation, on high-value terrorists.

Only about 200 military and civilian personnel were aware of Copper Green's existence before it was disclosed by the New Yorker's Seymour Hersh. The CIA's program, known internally by the acronym "GST," has been discontinued. Although "Copper Green" was disbanded, the Defense Department's detainee affairs section has set up a new special access program under which the rules for battlefield interrogations are established. It is classified Top Secret.

Bagram is in the middle of a major expansion, and the DIA facility is being renovated, officials said.

## **Terror Suspects Should Be Afforded Due Process Protections**

### **MULTIPLE HARMS FROM TREATING TERROR SUSPECTS AS ENEMY COMBATANTS NOT DESERVING SAME RIGHTS**

Stuart Taylor, Jr., Editor, *National Journal*, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 222

Meanwhile, conservative hawks clamor for Holder and President Obama to hand suspected terrorists over to the military as enemy combatants. But they ignore the damage that this approach does to America's image abroad; the large risk that any convictions by military commissions will crash on appeal; the dangers of subjecting possibly innocent people to decades of detention; and judicial decisions requiring that "enemy combatants" be given lawyers and other rights.

### **EVEN THE WORST TERRORISTS RETAIN BASIC RIGHTS**

Robert S. Gerstein, *Political Science Professor-UCLA*, 1982, *The Morality of Terrorism: Religious and Secular Justifications*, ed. D. Rapoport & Y. Alexander, p. 292-3

But I contend that there are limits upon the forfeiture of rights even for the worst criminals. The terrorists have undoubtedly lost all of the rights which a human being can lose through their conduct. They have murdered, tortured, and in every respect violated the human dignity of their victims. Still, I believe that they retain those rights that are inseparable from the humanity which they have violated in others. Even the terrorist would have a right to protest the destruction of that capacity which is at the core of humanity: the capacity for autonomous choice. This would mean that even the terrorists who brainwashed their captives could rightfully protest if they were subjected to brainwashing. Any effort forcefully to control the formation of their values or to dictate the expression of their beliefs would be a violation of this inalienable right.

### **NO REASON TO DIFFERENTIATE BETWEEN CITIZENS AND NON-CITIZENS – SHOULD BE TREATED IN CRIMINAL SYSTEM**

Wayne McCormack, *Professor of Law, University of Utah*, *San Diego International Law Journal*, 2004, 5 *San Diego Int'l L.J.* 7, p. 71

With regard to persons accused of committing terrorist acts against the United States or its interests, whether they are foreign nationals or U.S. citizens should be irrelevant. Until the international community defines terrorist crimes as being violations of the "law of war," the U.S. system should commit that these persons be tried in civilian courts rather than by military commissions. The principal reason for this conclusion is not that the civilian courts are necessarily "better" than military commissions but because there is no coherent distinction between the alleged terrorist and the ordinary street criminal.

### **BILL OF RIGHTS SHOULD BE APPLIED TO NON-CITIZENS**

Elizabeth M. McCormick, *William R Davis Clinical Fellow-University of Connecticut School of Law*, *Connecticut Journal of International Law*, Spring, 2004, 19 *Conn. J. Int'l L.* 423, p. 442

Beyond their humanity, Cole argues that non-citizens, by virtue of their lack of franchise and a history of anti-immigrant animus in the United States, are particularly deserving of heightened protection of their fundamental rights. Unable to participate in a political process that has on numerous occasions in the past ignored and even obliterated the rights and interests of non-citizens, the case for extending the Bill of Rights to non-citizens is all the more compelling. Moreover, Cole argues the nature of the rights at issue -- due process, equal protection, n92 and political freedom -- provides no reasonable basis for distinguishing between citizens and non-citizens. Free speech promotes values and interests -- autonomy, critical thinking, self-expression, and curbing government excess -- in which citizens and non-citizens have an equal stake. Similarly, Cole argues, the interests at stake when the state seeks to deprive an individual of life, liberty, or property do not usually depend on the citizen/non-citizen distinction. "While the definition of most constitutional rights contains an implicit consequentialist balance, the balance should be struck equally for all -- even if it might appear convenient or politically tempting to strike it differently for some." n93

## **No Justification for Treating Terrorism Suspects Differently Based on Citizenship**

### **DOUBLE STANDARD BETWEEN CITIZENS AND NONCITIZENS IS NOT JUSTIFIED**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 957-9

Some argue that a "double standard" for citizens and noncitizens is perfectly justified. The attacks of September 11 were perpetrated by 19 Arab noncitizens, and we have reason to believe that other Arab noncitizens are associated with the attackers and will seek to attack again. Citizens, it is said, are presumptively loyal; noncitizens are not. Thus, it is not irrational to focus on Arab noncitizens. Moreover, on a normative level, if citizens and noncitizens were treated identically, citizenship itself might be rendered meaningless. The very essence of war involves the drawing of lines in the sand between citizens of our nation and those against whom we are fighting. Surely in that setting it makes sense to treat noncitizens differently from citizens.

I will suggest that such reasoning should be resisted on three grounds: It is normatively and constitutionally wrong; it undermines our security interests; and it will pave the way for future inroads on citizens' liberties. First, properly understood, the Constitution imposes substantial limits on sacrificing immigrants' liberties for citizens' purported security. The basic rights at stake - political freedom, due process, and equal protection of the laws - are not limited to citizens, but apply to all "persons" subject to our laws. These rights are best understood not as special privileges stemming from a specific social contract, but from what it means to be a person with free and equal dignity. They are human rights, not privileges of citizenship, and ought to apply whenever we seek to impose legal obligations on persons. The Constitution reserves relatively few rights to citizens, the principal one being the right to vote. And precisely because noncitizens do not enjoy the franchise, and therefore cannot rely on the political process for their protection, it is all the more critical that they be accorded basic human rights enforceable in court.

The fact that we are waging a "war on terrorism" does not alter these basic constitutional principles. This war is more akin to the metaphorical (and indefinite) "war on drugs" or "war on crime" than to a conventional war. As yet, it finds no nation on the other side. We are fighting an international criminal organization, Al Qaeda, and those who aid it, including, thus far, the Taliban. But we have declared war on no nation. Moreover, as the Japanese internment of World War II illustrated, it is perilous to predicate suspicion on ethnic identity even with respect to persons associated with a specific country on which we have declared war. It is another matter entirely to apply such treatment to citizens from a wide range of Arab countries, most of which are fighting on our side in the war on terrorism.

Second, as a security matter, employing a double standard with respect to the basic rights accorded citizens and noncitizens is likely to be counterproductive at home and abroad, because it undermines our legitimacy in both spheres. At home, law enforcement is more effective when it works with rather than against communities. If authorities have reason to believe that there might be potential terrorists lurking in the Arab immigrant community, they would do better to work with the millions of law-abiding members of that community to obtain their assistance in identifying potential threats, than to alienate the community by treating many of its members as suspect because of their ethnicity or national origin and pursuing others under conditions of secrecy that invite fear and paranoia.

Legitimacy is essential at the international level as well. As September 11 illustrated, terrorism is a transnational phenomenon, and it demands a transnational response. We must maintain a broad coalition if we are to succeed in our efforts, not only because we need the cooperation of many different nations' intelligence and law enforcement apparatuses, but also because if we are seen as fighting for our own parochial interests and not for the interests of justice and peace more broadly, we are likely to inspire more people to take up the mantle of terrorism against us. As the critical responses of our allies to the military tribunals and the Guantanamo detentions illustrate, our credibility on matters of international law and human rights is already at a low ebb. n17 This is in large part our own fault; as the world's most powerful nation, we have too often acted as if we are free to ignore international norms whenever it serves our interests. n18 But doing so will surely undermine the multilateral coalition we desperately need to fight the war against terrorism effectively. Secretary of State Colin Powell's reported objections to the United States' stance on the Guantanamo prisoners reflects precisely that concern. n19

Finally, what we are willing to allow our government to do to immigrants creates precedents for how it treats citizens. In 1798, for example, Congress enacted the Enemy Alien Act, which remains on the books to this day and authorizes the President during wartime to detain, deport, or otherwise restrict the liberties of any citizen over 14 years of age of a country with which we are at war, without any individualized showing of disloyalty, criminal conduct, or even suspicion. In World War II, the government extended that logic to intern 110,000 persons of Japanese ancestry, about two-thirds of whom were U.S. citizens. Similarly, while we think of the McCarthy era as beginning in the 1940s, it was in fact preceded by several decades of targeting immigrants for their purportedly subversive political associations using immigration law. Joe McCarthy simply applied to citizens techniques developed in the 1910s under the leadership of a young J. Edgar Hoover, head of the Justice Department's "Alien Radical" division. Measures initially targeted at noncitizens may well come back to haunt us all.

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## **Constitution Does Not Restrict Due Process Protections to Citizens**

### **NON-CITIZENS ENTITLED TO CONSTITUTIONAL DUE PROCESS PROTECTIONS**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 108

The Bill of Rights protects “persons,” not “citizens.” For more than a century the court has held that aliens are “persons” under the meaning of the Fifth and Fourteenth Amendments and therefore are entitled to due process of law. In the years preceding the 9/11 attacks, American constitutional law gradually had come to provide aliens—even illegal aliens—with many of the civil rights and liberties enjoyed by American citizens. But after 9/11, with newly heightened concerns about terrorists entering the United States, law enforcement and immigration officials singled out some aliens for intensive screening and investigation, and soon question arose as to whether their constitutional rights to due process of law were being violated.

### **RIGHTS SHOULD NOT REST ON CITIZENSHIP STATUS**

Ian F. Haney Lopez, **Professor of Law, University of California, Boalt Hall**, *White by Law: the legal construction of race*, 1996, p. 35

I must say, however, that the prerequisite cases supply ample evidence for Alexander Bickel’s argument that rights ought not to rest on citizenship, because citizenship, as a political status, is too easily taken away. “Citizenship is legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the Dred Scott decision.

### **NO JUSTIFICATION FOR CITIZEN/NON-CITIZEN DISTINCTION IN DUE PROCESS**

Jerome A. Barron, **Professor of Law, George Washington University Law School**, *Notre Dame Journal of Law, Ethics & Public Policy*, 2005, 19 ND J. L. Ethics & Pub Pol’y 33, p. 66-7

An insistence that citizens under our Constitution are not at the mercy of the unreviewable will of the Executive is admirable. But does the Constitution support this contention? The Due Process Clause of the Fifth Amendment, upon which Justice Scalia relies, refers, after all, to persons, not citizens. n171 Similarly, the Due Process Clause of the Fourteenth Amendment extends its embrace to persons, not just citizens. An additional textual problem is that, while the Fourteenth Amendment prohibits the states from abridging the privileges and immunities of U.S. citizens, the Amendment does not speak to the federal government. But if the Citizenship Clause n172 is read together with the Privileges and Immunities Clause n173 of the Fourteenth Amendment, the resolution of the problem is certainly illuminated by the declaration of the Supreme Court as recently as 1999 in Saenz v. Roe: n174 “The protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as that of the States.” n175 The phrase, “privileges and immunities of United States citizenship,” is a concept that constitutes a limitation on the federal government as well as the governments of the states. Justice Samuel Miller in the Slaughterhouse Cases n176 set forth the privileges and immunities of United States citizenship. n177 His list was certainly not a generous one. But lest it be thought that his Slaughterhouse Cases opinion left the privileges and immunities of the Citizenship Clause of the Fourteenth Amendment without any content, Justice Miller listed a number of privileges and immunities relating to “the Federal government, its National character, its Constitution, or its laws.” n178 In the paragraph summarizing them he made the following statement: “The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution.” n179 Justice Bradley, dissenting, in the Slaughterhouse Cases, also stated that the right of habeas corpus is among “the privileges and immunities of citizens of the United States” n180 and has been since the enactment of the original Constitution. It is a puzzle why Justices Scalia and Stevens did not anchor the right of a citizen to habeas corpus in the privileges and immunities of citizens of the United States. Despite the foregoing, this right of the citizen to habeas corpus review as a privilege and immunity of United States citizenship is not mentioned in any of the opinions of the justices in the enemy combatant cases. This is more than surprising since the two enemy combatant cases involving United States citizens - Padilla and Hamdi - came to the federal courts by way of habeas corpus review.

### **RIGHTS—ESPECIALLY DUE PROCESS—SHOULD NOT BE DEPENDENT ON CITIZENSHIP STATUS**

Jerome A. Barron, **Professor of Law, George Washington University Law School**, *Notre Dame Journal of Law, Ethics & Public Policy*, 2005, 19 ND J. L. Ethics & Pub Pol’y 33, p. 68-9

In an insecure world menaced by fears of terrorism and inclined to sacrifice, therefore, too quickly the liberty of its citizens, we should revisit the idea that rights should never depend on citizenship. It is a well-motivated idea, but it should not be given uncritical acceptance by civil libertarians. If government is emboldened to act in difficult times in a repressive manner, citizenship can require, as Justice Scalia has shown, a

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constitutional procedure which government is obliged to follow. If that procedure is deemed too cumbersome for the age of terrorism, at least the minimal due process procedure outlined by Justice O'Connor and amended by Justices Souter and Ginsburg is better than the absence of any individualized procedure, which the government initially sought to defend. n185

#### **DUE PROCESS APPLIES TO ALL PERSONS—NOT CITIZENS**

Eric K. Yamamoto et al, **Professor University of Hawai'i, Richardson School of Law**, Race Rights and Reparations: Law and the Japanese American internment, **2001**, p. 15

The US Constitution, particularly its Bill of Rights and the post-Civil War amendments, is replete with sources of legal rights. Less noticed is the fact that almost none of these provisions refer to "citizens" or "race." Most of these rights inhere to "people" or "persons," or sometimes to "the accused" or "the party." Typical in wording is the first amendment right of "the people peaceably to assemble, and to petition the Government for redress of grievances." Similarly, the fourth amendment guarantees "the right of people to be secure in their persons...against unreasonable searches or seizures." With a few exceptions, such as the privileges and immunities clause of the fourteenth amendment of fifteenth amendment right to vote, constitutional rights do not distinguish between the rights of citizens and those of non-citizens. Nor, with the exception of the fifteenth amendment right to vote, is the term "race" found.

#### **DUE PROCESS APPLIES TO "ANY PERSON" ACCUSED OF A CRIME BY THE FEDERAL GOVERNMENT**

Gerard J. Clark, **Professor of Law, Suffolk University School of Law**, University of Pittsburgh Law Review, Summer, **2002**, 63 U. Pitt. L. Rev. 837, p. 857

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

#### **ANY DETAINEE ON US SOIL DESERVES BASIC DUE PROCESS RIGHTS**

Wayne McCormack, **Professor of Law, University of Utah**, San Diego International Law Journal, **2004**, 5 San Diego Int'l L.J. 7, p. 10

Second, the administration decided that a U.S. citizen captured overseas in the same operation's zone of "armed conflict" could be declared an "enemy combatant" and held in custody with no contact with the outside world and no prospects of judicial proceedings. n14 Although this detainee, Yaser Hamdi, might have been held in military detention in the zone of combat or theater of operations, as soon as he was transferred to U.S. soil he reacquired rights embodied in basic concepts of due process such as the right to a fair hearing on his alleged wrongdoing.

#### **ALIENS IN THE US ARE "PERSONS" GUARANTEED DUE PROCESS OF LAW BY THE 5TH & 14TH AMENDMENTS**

Megan Peitzke, **Law Student, Pepperdine Law Review**, **2003**, 30 Pepp. L. Rev. 769, p. 770-1

United States Supreme Court Justice William J. Brennan once wrote of immigrants, "Whatever his status under the immigration laws, an alien is surely a 'person' ... . Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." n2 Almost twenty years after the Supreme Court recognized the due process rights of aliens, the Court is still reviewing laws that attempt to deprive aliens of such rights. One of these laws is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted in 1996, which altered numerous provisions of the Immigration and Nationality Act (INA). n3 Under the IIRIRA, Congress required the Immigration and Naturalization Service (INS) to detain aliens ordered deported during the removal period of ninety days. n4 Another provision of the IIRIRA, which applies to inadmissible or criminal aliens, allows the Attorney General to detain an alien ordered removed beyond the removal period, and does not limit the time of detention. n5 The

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law has been described by one observer as "the most diverse, divisive and draconian immigration law enacted since the Chinese Exclusion Act of 1882." n6

### ALL DETAINEES IN THE US—CITIZEN OR NOT—ARE PROTECTED BY EQUAL PROTECTION CLAUSE

Liam Barber, Law Student, Villanova Law Review, 2002, 47 Vill. L. Rev. 451, p. 454-5

The potential use of racial profiling to combat terrorism is both a legal and policy based issue. n29 Preliminarily, although many Arabs affected by such measures may be non-citizen aliens, it is important to clarify that aliens legally inside the United States are afforded full Fourth, Fifth and Fourteenth Amendment protections. n30 In addition, even illegal aliens are protected by the Equal Protection Clause. n31 Only aliens outside U.S. territory, such as "enemy aliens" or those who have not developed societal or residential connections with the United States, do not receive Fourth, Fifth and Fourteenth Amendment benefits. n32 Assuming, then, that these core constitutional protections apply to Arabs who live and travel inside the United States, the issue focuses on four fronts: (1) the imminence of and support for using racial methods in the United States, (2) the use and impact of racial profiling outside the United States, (3) the legal standard applied to racial profiling in the United States and (4) the extent that the legal standard protects rights during national crisis.

### ALIENS ENTITLED TO DUE PROCESS PROTECTIONS

David Cole, Law Professor, Georgetown, TERRORISM AND THE CONSTITUTION, 2003, p. 100

"There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons from deprivations of life, liberty, or property without due process of law. Even one who presence in this country is unlawaul, involuntary, or transitory is entitled to that constitutional protect (Matthews v. Diaz, 426 U.S. 67, 77 (1976).

### ALIENS ENJOY THE PROTECTIONS OF THE BILL OF RIGHTS

Immigrant Rights Clinic, New York University School of Law, New York University Review of Law & Social Change, REVIEW OF LAW & SOCIAL CHANGE, 2000/1, pp. 402-3

Although Congress retains plenary power to designate the nation's policy with respect to immigration, that power is "subject to judicial intervention under the paramount law of the constitution." Aliens present in the United States are within the fold of the Constitution's protection, substantially enjoying the rights guaranteed by the Bill of Rights and the Fourteenth Amendment.

### CONSTITUTION ONLY DISTINGUISHES RIGHT TO VOTE AND HOLD OFFICE BASED ON CITIZENSHIP STATUS

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 441-2

Cole begins by challenging the widely held perception that non-citizens enjoy many fewer rights than do citizens, pointing out that the Constitution presumptively extends not just to citizens but to all who are subject to American legal obligations and to all physically present in the United States. n89 With the exception of the right to vote and to hold public office, the Constitution makes no distinction between the rights of citizens and non-citizens and, Cole points out, the courts have repeatedly recognized non-citizens' constitutional rights to due process, equal protection and free speech. Beyond the Constitution, Cole argues that there are certain basic rights to which all persons are entitled by virtue of their humanity and points out that these rights -- due process, equal protection, and political freedoms -- are recognized by international human rights instruments as applying to nationals and non-nationals alike. n90 Finally, he looks to the practice in other states as the basis for a normative argument for extending fundamental rights to non-citizens. Cole offers several examples -- from Sweden to Canada to Great Britain to Germany -- of constitutional and statutory provisions granting equal rights and freedoms to citizens and non-citizens alike. In light of this broad consensus, Cole contends that "the rights of political freedom, due process, and equal protection are among the minimal rights that the world has come to demand of any society." n91

### ONLY THE RIGHTS TO VOTE AND RUN FOR OFFICE ARE LIMITED TO CITIZENS—OTHER CONSTITUTIONAL PROTECTIONS APPLY TO PERSONS

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 978-9

The Constitution does distinguish in some respects between the rights of citizens and noncitizens. But in fact, relatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation. Thus, the First and Fourth Amendments protect the rights of "the people," while the Fifth and Fourteenth Amendment Due Process Clauses, as well as the Equal Protection Clause, extend their protections to all "persons." The rights

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attaching to criminal trials apply to "the accused." As the Court has noted, the fact that the Framers knew how to limit rights to citizens, and chose to so limit only the right to vote and run for office, indicates that the other rights are not so limited. Specifically, the Court has stated that neither the First nor the Fifth Amendment "acknowledges any distinction between citizens and resident aliens" n100 For more than a century, the Court has recognized that the Equal Protection Clause is "universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of ... nationality." n101 Similarly, the Court has repeatedly stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." n102 And when noncitizens, no matter what their status, are tried for crimes, they are entitled to all of the rights that attach to the criminal process. n103



## **Treating Non-Citizen Suspects Differently Violates Rule of Law/Justice**

### **RULE OF LAW PROTECTS ALL PEOPLE – SHOULD NOT MAKE DISTINCTIONS BASED ON CITIZENSHIP**

Robin West, Professor of Law, Georgetown University Law Center, 2000 (QUINNAPAC LAW REVIEW, Is the Rule of Law Cosmopolitan? p. 278)

A human being protected by the rule of law so conceived, is neither the creature of tradition nor the stark potential for free will presupposed and protected by traditional and libertarian accounts of the rule of law respectively. A human being protected by a law that exists so as to ensure the conditions of a community of equal individuals is a human being in need, specifically of that law's protection. It is the human being with material needs, emotional ties, cultural ambitions, and intellectual aspirations that are frustrated, denied, threatened, or annihilated by not only the natural wilderness, but also by the flow of the unchecked antipathies and sympathies of extra-or pre-legal human nature. It is the human being whose needs for survival are going to be denied or unmet by an unregulated market economy that presupposes only the universalizability, and hence rationality, of will, rather than need. It is the human being whose maternalism is denied or crushed by an unregulated social order hostile to the dependency and neediness of mothers and children. It is the human being whose materiality and mortality are ignored by a technologically advanced warrior society that shields the eyes and hearts of its citizens from the evidence of the bodily suffering and death that its aggression engenders. It is the human being, with needs, capacities, ambitions, connections to others, and aspirations, that is left outside of natural, societal, or traditional circles of concern that in turn define that person, or that person's needs, as lesser, or as of lesser moment. The "outsider," no matter what makes her such, simply is the human being for whom the rule of law, understood as the guarantor of those conditions that sustain a community of equal individuals, exists. This egalitarian and communitarian understanding of the rule of law strongly implies an ethical, rather than economic cosmopolitanism. If we should treat likes alike because justice requires it, and if justice requires it because doing so reaffirms our conviction that, by virtue of a shared humanity, all humans should be equally regarded, and if we sustain that conviction and institutionalize it in law precisely because of our temptation to draw our circle of communitarian concern more narrowly, then such a mandate obviously does not stop at our borders. The mandate exists as an injunction to question both the coherence and motivation of borders of exclusion, whether national or cultural. If we should "treat likes alike" in law, because by so doing we create and affirm a community of equal persons, then we obviously should be as concerned with the justice or injustice of a dropped bomb in the Sudan to fight international terrorism as we are concerned with the injustice of a dropped bomb in Philadelphia to fight the domestic equivalent. These are like cases. We should be as concerned with the lack of an economic safety net around the globe in those regions making rocky transitions to market economies as we are concerned with the lack of a safety net in this country that might cope with the same economic trauma experienced by American families. These are like cases. We should be as outraged by the environmental costs and the lack of rights for laborers entailed by the internationalization of contract law as we are by the miseries entailed by a deregulated laissez faire regime in our own. These are like cases. In all of these cases, our relative nonchalance in the face of the evil visited on distant others, when contrasted with the outrage we feel when the same evil strikes close to home, is an instance of failing to treat likes alike. In all of these cases we reap the benefits of the state policy in question by drawing a narrow circle of egalitarian concern. Furthermore, in all of these cases of injustice, we profit. Like Sally, we celebrate as well as enjoy the profits of industry and commerce, while expressing the admirable concern that sometimes people get hurt, and like Sally, we are secure in our knowledge that it is other and distant and lesser lives, rather than real people, that pay the price of our comforts.

### **ADOPTING A DIFFERENT STANDARD OF TREATMENT FOR NON-CITIZENS DANGEROUS**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 425

First, the distinction drawn between citizen and non-citizen is illusory in the long run and ultimately. Cole argues, all citizens' rights are in the balance when the government selectively sacrifices foreign-nationals' liberties in the name of national security. Second, a history of overreaction in times of crisis suggests that selectively burdening the aliens among us with a loss of fundamental rights is a move that we will undoubtedly regret in the long run. According to Cole, we can instead avoid that cycle of overreaction and apology by determining from the beginning to strike the balance between security and liberty equitably for all. Third, the double standard is counter-productive as a security measure because it undermines the legitimacy, both in the United States and in the international community, of the government's efforts to combat terrorism. Cole's fourth and most compelling argument for refusing to engage in the double standard for citizens and non-citizens is that it is morally and constitutionally wrong.

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The rights and freedoms of non-citizens which have been restricted, Cole argues, are human rights, not privileges of citizenship. Our ability as a nation to recognize and protect these rights for citizens and non-citizens alike will, he promises, ultimately be the test of "the character of America's future."

### **DENYING NON-CITIZEN TERRORISM SUSPECTS BASIC RIGHTS VIOLATES OUR BASIC JUSTICE SYSTEM**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 441

In his final chapter, Cole's arguments turn from the practical to the humanistic as he lays out his case for why the distinctions between citizen and non-citizen relied on so heavily in the war on terror are just plain wrong. He sets forth a compelling argument for why such distinctions are neither constitutionally justified nor consistent with international law. The rights and liberties which have been under assault in the war on terror -- political and religious freedoms, due process, equal protection of the laws -- are not privileges of citizenship, but are "inherent in what it means to be a free person with human dignity." n87 Moreover, Cole reasons that trading non-citizens' basic human rights in the name of security is wrong as a normative matter. "When we balance liberty and security . . . we should respect the equal dignity and basic human rights of all persons because it is the right thing to do." n88 Our nation's overwhelming failure to do so in the wake of September 11, he warns, signals the loss of our own humanity.

## **Treating Non-Citizen Suspects Differently Violates International Law**

### **TREATING NON-CITIZENS DIFFERENTLY ANTITHETICAL TO INTERNATIONAL LAW**

Ernesto **Hernandez-Lopez**, **Law Professor-Chapman University, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 59-60

Peter Fitzpatrick and Eve Darian-Smith present another postcolonial insight into international law: the “ambivalence in the rule of law.” Fitzpatrick and Darian-Smith examine how law is at the forefront of the West’s relations to its “others.” They explain how European or Western structures seek to exclude non-Western identities as “others,” savages, or barbarians, and even those in the West who are “less occidental than they should be.” This is antithetical to international law’s claims of universalism because it rejects while it simultaneously claims to be inclusive and all-encompassing. This produces an “irresolute identity,” wherein the West is excluding yet encompassing its “others.”

### **INTERNATIONAL LAW NECESSITATES DUE PROCESS RIGHTS FOR TERRORISM SUSPECTS**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 26

On October 10, 2003, an International Bar Association task force of terrorism experts issued a report, “Task Force Principles on Suppressing Terrorism Within the Framework of International Law.” The main points can be briefly summarized: “the threat of terrorism should not be used by states as a reason to disregard fundamental norms of international law”; the fight against terrorism should not become a pretext “to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion”; all restrictions of substantive human rights in a state of emergency must be provided for by law, and not exclude the possibility of judicial review. The task force was particularly insistent about guarantees of due process: “The fundamental due process guarantees must be accorded those facing trial, whether before a military tribunal or regularly constituted court, at times of peace and during armed conflict. This necessitates at the least protecting the presumption of innocence, the right to be tried by an independent and impartial court, access to counsel and the right to appeal.” It recommended that the independence of the judiciary be maintained and that judges act impartially. Those detained must not be held incommunicado or in solitary confinement; they must be able to challenge their imprisonment in court, they must not be held indefinitely, and they may not be held outside the jurisdiction of courts competent to determine the legality of their detention. The IBA argued that “International Cooperation Respect for the rule of law and adherence to international human rights standards will greatly enhance international cooperation in combating terrorism.”

### **INTERNATIONAL HUMAN RIGHTS LAW REQUIRES TREATING TERRORIST SUSPECTS THROUGH A LAW ENFORCEMENT MODEL**

Major Matthew J. Machon, **US Army, 2006**, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [www.fas.org/irp/eprint/machon.pdf], p. 38-9

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR) takes a somewhat different and more specific approach, stressing the obligation of the state to protect an individual’s right to life. Article 2 of the ECHR establishes a proportionality test to determine the required conditions necessary to justify the state’s use of lethal force, reading:

“Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

The use of lethal force by the state, according to the model provided by the ECHR, requires what amounts to an examination of the necessity of the action and the proportionality of the use of force. Kretzmer provides two key questions that succinctly establish the requirements for the state’s employment of lethal force:

- “1. Is the use of force absolutely required, or could other measures be employed to protect the threatened persons?
- 2. Assuming no other measures are available, is it absolutely necessary to use lethal force, or could some other lesser degree of force be employed?”

Exceptions to the prohibition on states intentionally depriving a person of his fundamental right to life must be “interpreted in light of the fundamental assumption that international human rights law adopts a law-enforcement model based upon the principles of due process.” According to Kretzmer, the reliance upon a law

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enforcement model requires that all measures taken by the state must be compatible with the following principles:

“1. every individual benefits from the presumption of innocence

2. persons suspected of perpetrating or planning serious criminal acts should be arrested, detained, and interrogated with due process of law

3. if there is credible evidence that such persons were indeed involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial before a competent and independent court and if convicted, sentenced by the court to a punishment provided by law.”

## **Treating Non-Citizen Suspects Differently Rationalizes Repression**

### **US HISTORICALLY RELIED ON CITIZEN/NON-CITIZEN DISTINCTION TO RATIONALIZE POLITICAL REPRESSION**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 435

From the Palmer Raids to the Japanese internment to the Cold War, Cole traces the history of America's overreaction to perceived security threats from abroad with a pattern of overreaction and political repression aimed first at foreign nationals and inevitably extended across the citizen-noncitizen divide. Indeed, Cole suggests that, historically, anti-alien sentiment and tactics have been widely exploited in the government's efforts to rationalize political repression. In other words, because it has proven relatively easy in times of national crisis to harness public antipathy toward the foreigner among us, the government has been able to gain public support for what would be intolerable restrictions on liberty if applied to citizens, only to later extend the restriction to citizens: Virtually every significant government security initiative implicating civil liberties -- including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention -- has originated in a measure targeted at non-citizens. The government has frequently defended such measures -- legally and politically -- by arguing that the threat stems from abroad, and that non-citizens do not deserve the same rights and protections as U.S. citizens . . . But almost as inevitably, government officials have thereafter extended similar security measures to U.S. citizens. n63

### **IF WE SACRIFICE LIBERTY FOR SECURITY THE BURDEN SHOULD FALL EQUALLY ON ALL—NOT SINGLE OUT MINORITIES**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 956-7

Understanding both the importance of liberty and the temptation to restrict it that government authorities and democratic majorities would face in times of crisis, the Framers sought to protect our basic liberties from the momentary passions of the majority by inscribing them in the Constitution. But with few exceptions, constitutional rights are not absolute; a balance must be struck. As Justice Goldberg famously put it, "[the Constitution] is not a suicide pact."

Thus, while the tension between liberty and security should not be overstated, it cannot be denied. We love liberty and security, but recognize that sometimes we must limit one to enjoy the other. n16 When a democratic society strikes that balance in ways that impose the costs and benefits uniformly on all, one might be relatively confident that the political process will ultimately achieve a proper balance. But all too often we seek to avoid the difficult trade-offs by striking an illegitimate balance, sacrificing the liberties of a minority group in order to further the majority's security interests. In the wake of September 11, citizens and their elected representatives have repeatedly chosen to sacrifice the liberties of noncitizens in furtherance of the citizenry's purported security. Because noncitizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, noncitizens' interests are even less likely to weigh in the balance.

## **Treating Non-Citizen Suspects Differently Threatens Rights of Citizens**

### **ANTI-TERRORISM POLICIES DIRECTED TO NON-CITIZENS THREATEN CITIZEN RIGHTS AS WELL**

Susan M. Akram & Maritza Karmely, Associate Clinical Professor, Boston University School of Law & Public Interest Attorney, U.C. Davis Law Review, March, 2005, 38 U.C. Davis L. Rev. 609, p. 673-4

This "inside"/ "outside" distinction may have been obliterated in the post-9/11 world. The government now uses immigration detention to pursue criminal investigations and prosecutions; uses preventive detention in ways not permitted in the immigration process and unconstitutional in either civil or criminal processes; n320 posts immigration violators on criminal databases to be utilized by state and federal law enforcement untrained in immigration law; and applies high security measures to immigration detainees without affording them the normal constitutional protections that would be applicable to them if they were detained in the course of a criminal or terrorism investigation. The consequences of this "blurring of the lines" are that both citizens and noncitizens are being stripped of constitutional protections on the basis of ethnicity or religious identity in nonimmigration contexts that do not justify the constitutional exceptionalism of plenary power. n321

### **JUSTIFYING DENIAL OF LIBERTY FOR NON-CITIZENS CAN SPILL-OVER TO THREATEN EVERYONE'S LIBERTY**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 431-2

The government has been similarly interested in maintaining a veil of secrecy with regard to the detention and treatment of hundreds of foreign nationals held at a United States military base in Guantanamo Bay, Cuba. These detainees, all captured as part of the war on terror, and purportedly taken into custody for their connections with Al Qaeda or the Taliban, have been held incommunicado, without access to counsel, without charge, and without any kind of hearing -- some for more than two years. n36 The detention, according to the Bush administration, is pursuant to the military's power to capture and detain, during wartime, enemy combatants, n37 and the President has ordered that anyone arrested as an enemy combatant in the war on terror be tried by military tribunal. n38 Cole points out that, although the Constitution permits trial by military tribunal for citizens accused of fighting with the enemy, at least initially the administration limited the application of military justice to non-citizens. Cole suggests that this was a decision based on politics, not law, which in the end proved well-calculated. Though there was widespread condemnation from human rights organizations and the international community in connection with the treatment of non-citizen "enemy combatants," n39 it was not until military custody was imposed on two United States citizens that there was a comparably critical reaction from the American public. According to Cole, the ultimate extension of the enemy combatant designation to citizens Yasser Hamdi and Jose Padilla, n40 and the dramatically different public response to their arrests and detention, is indicative not only of the willingness of the American public to allow non-citizens to disproportionately sacrifice their freedom for the security of the majority, but also of the ease with which the government's distinction between citizen and non-citizen can be blurred in times of crisis. The political momentum which initially permitted the infringement of the rights of foreign nationals can all too quickly spin out of control, Cole argues, and take with it the freedoms of citizens and non-citizens alike.

### **SECURITY MEASURES AIMED AT IMMIGRANTS LAYS THE GROUNDWORK FOR DEPRIVATION OF CITIZENS' RIGHTS**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 434-5

If we are not vigilantly aware of our actions and attitudes toward non-citizens in this war on terror, we are destined as a nation, Cole contends, to repeat the same mistakes we have made countless times in the past. These are mistakes that we will inevitably regret for a number of reasons, not the least of which is that "security measures targeted at immigrants have virtually always laid the groundwork for future deprivation of citizens' rights." n59

### **INTERNMENT OF PERSONS OF JAPANESE ANCESTRY WAS PRECEDED BY POLICIES RESTRICTING THE RIGHTS OF NONCITIZENS**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 990-1

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The Enemy Alien Act is a precursor to the internment of 110,000 persons of Japanese ancestry during World War II. The justification for the Enemy Alien Act is that during a war government should have the power to confine and neutralize all persons with ties to the country we are fighting, because aliens are presumptively loyal to their own country, and therefore, presumptively our enemies. In World War II, we simply extended that philosophy to Japanese Americans. The Army argued that persons of Japanese descent, even if they were technically American citizens because they were born here, remained for all practical purposes "enemy aliens," likely to be loyal to Japan. Lt. General John L. DeWitt, the driving force behind the internment orders, wrote in his report on the Japanese evacuation that "the Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." n147 More colloquially, General DeWitt testified in 1943 before the House Naval Affairs Committee, that "[a] Jap's a Jap. It makes no difference whether he is an American citizen or not." n148 Secretary of War Henry Stimson concurred, reasoning that "their racial characteristics are such that we cannot understand or trust even the citizen Japanese." n149 The Supreme Court accepted the rationale in several cases reviewing the Japanese curfews and internment. n150 Thus, in *Hirabayashi v. United States*, n151 the Court reasoned that "the fact alone that the attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular association with Japan."

As these quotations reveal, the "enemy alien" concept was extended not to all citizens, but to a distinct subset, through the prism of race. The Japanese alien could not be distinguished from the Japanese-American citizen because, as General DeWitt put it, "the racial strains are undiluted." Citizens of German and Italian ancestry were not interned en masse; only the Japanese were. The linkage between alienage and race has a long history in the United States. In the mid-nineteenth century, for example, anti-Chinese sentiment in California led to frequent lynchings, stonings, and beatings of Chinese immigrants, as well as to laws barring Chinese from testifying in cases involving whites. n152 California Governor John Bigler argued in 1852 "that the Chinese were a moral evil, that as coolies they were little more than slaves, that they degraded white labor and were inherently incapable of playing the role of citizens." n153 In 1876, the California state legislature published "An Address to the People of the United States on the Evils of Chinese Immigration," n154 and in 1882, Congress enacted the first Chinese exclusion laws, barring Chinese from entering the United States. n155 Shortly thereafter, Congress enacted a law requiring Chinese immigrants already living here to establish the legality of their presence by presenting the testimony of "one white witness." n156

#### **ANTI-ALIEN MEASURES WILL SNOWBALL TO CITIZENS**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 994

Measures directed at aliens can also extend to citizens through the prism of politics. Thus, a second example of anti-alien initiatives laying a foundation for incursions on citizens' rights can be found in the connections between efforts to target "alien radicals" during the early part of the twentieth century and the more broad-based anti-Communist measures of the 1940s and early 1950s under Senator Joseph McCarthy and the House Un-American Activities Committee. Here, the common currency was political association, as efforts to suppress Communist aliens transformed into a war on Communists irrespective of citizenship.

#### **JUSTIFYING RESTRICTIONS OF LIBERTY ON NON-CITIZEN STATUS THREATENS THE RIGHTS OF ALL—INCLUDING CITIZENS**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 1003

History reveals that the distinction between citizen and alien has frequently been resorted to as a justification for liberty-infringing measures in times of crisis. In the short term, the fact that measures are limited to noncitizens appears to make them easier for the majority to accept - citizens are not asked to sacrifice their own liberty. But the same history suggests that citizens should be wary about relying on this distinction, because it has often been breached before. What we are willing to do to noncitizens ultimately affects what we are willing to do to citizens. In the long run, all of our rights are at stake in the war against terrorism.

#### **REPRESSION AGAINST ETHNIC AND RELIGIOUS MINORITIES SNOWBALLS TO REPRESSION AGAINST EVERYONE**

Leila Nadya Sadat, Professor of Law, Washington University, The Wayne Law Review, Spring, 2004, 50 Wayne L. Rev. 69, p. 78

All these arguments represent self-interested policy rationales for the elimination of ethnic and religious prejudice against Arabs and Muslims—both in the United States and abroad. However, there is an additional reason to take these issues seriously. Ethnic and religious minorities are like canaries in a coal mine: when they begin to suffer, it is probably not long before society as a whole becomes more repressive and less free. At a conference on international criminal law and justice, it is worth remembering that Nuremberg's revolutionary contribution to international law was the concept of individual criminal responsibility--the United States and its allies specifically eschewed any

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conception of collective guilt. What a pity it would be if we ignored that felicitous precedent and instead continued to set policy on the basis of prejudice and racism. If the United States is not to become a distorted mirror of the authoritarian Arab and Muslim governments it now critiques, and if we wish to avoid condemning our society to the use of increasing and escalating violence, all carried out in the name of national security, we need to find a better way to address our national security needs than making scapegoats of hundreds of millions of innocent people who had absolutely nothing to do with the terrorist attacks of September 11th, just because those individuals live in Arab or Muslim countries, or are of Arab or Muslim origin. Returning to the Arab Human Development Report cited earlier, I agree with its sober reporting on the state of the Arab world, and it is undoubtedly the responsibility of Arab governments to transform their countries so that their people prosper. The United States can play an important role in that transformation, not by continued invasion and occupation, but by treating Arabs and Muslims with respect and by using its close relationship with the Sharon government to help address one of the primary obstacles to peace in that region, and peace in the world.

#### **DENIAL OF NONCITIZEN RIGHTS SETS STAGE FOR DENIAL OF CITIZEN RIGHTS**

Kevin R. Johnson, Law Professor, University of California at Davis, The “Huddled Masses” Myth, 2004, p. 12

Denial of rights to noncitizens lays the groundwork for the denial of rights to citizens. Clearly, those who are truly committed to racial justice in the United States cannot ignore the treatment of immigrants.



## **Treating Non-Citizen Suspects Differently Counterproductive in Fight Against Terrorism**

### **CITIZEN/NON-CITIZEN DISTINCTION IN SECURITY MEASURES COUNTERPRODUCTIVE**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 437

Nous sommes tous Américains. We are all Americans. This was the headline in Le Monde on September 13, 2001, a headline which expressed a sentiment shared by many across the world. "How can we not feel," the article began, "as in the most grave moments of our history, profoundly linked with this people and this nation, the United States, with whom we are so close and to whom we owe freedom, and therefore our solidarity." n71 The point of view reflected here was not unique. In the aftermath of the terrorist attacks, the United States enjoyed the overwhelming support and compassion of the international community. Moreover, there was a sense that the only appropriate response was for the international community to unite in its condemnation of these barbaric attacks and their perpetrators. Almost immediately, however, it became clear that the United States' response to the attacks would fail on many levels to garner the support of many of its allies. Indeed, perhaps the most troubling aspect of the United States' response was the perception that the United States was not particularly interested in reaching out to form the kinds of coalitions that might succeed in preventing another massive terrorist attack. Rather than seeking solidarity with its allies, Cole suggests that the United States ultimately squandered much of the good will it enjoyed after September 11 because it adopted a unilateral foreign policy and a double standard imposing restrictions on the liberties of non-citizens that were not imposed on citizens. The resultant lack of legitimacy in the international community, as well as in foreign national communities in the United States, has undermined rather than enhanced national security.

### **CITIZEN/NON-CITIZEN DISTINCTION ALIENATES POTENTIAL ALLIES IN WAR ON TERRORISM**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 439-40

This loss of legitimacy extends overseas, where the United States has been widely criticized for measures selectively targeting non-citizens and for an unwillingness to abide by rules that govern the rest of the world. Through its failure to heed its obligations under international law, its willingness to bypass the United Nations Security Council, and its prolonged detention of hundreds of foreign nationals, the United States has compromised its moral authority and its ability to maintain broad international support. These double standards, Cole contends, hinder international cooperation essential to identifying and capturing those plotting against us. "Intelligence and law enforcement support will turn at least in part on the extent to which we are fighting for a broad principle of justice, rather than for our own parochial self-interest." n77 Just as Benjamin Franklin declared during the American Revolution that "we fight not just for ourselves but for all mankind," n78 Cole suggests that the United States must demonstrate that self-interest is not its only motive for action. Robert Kagan expressed a similar sentiment with his proposition that "even at times of dire emergency, and perhaps especially at those times, the world's sole superpower needs to demonstrate that it wields its great power on behalf of its principles and all who share them." n79 To the extent that the United States abandons the principles of justice and democracy in the war on terror, it risks a loss of legitimacy and a consequent loss of ground to its enemies. Like other critics of the war on terror, Cole recognizes that the "terrorists' greatest threat is to the survival of principle" and that our enemies thrive when they succeed in forcing us to abandon our principles. n80

### **FAILURE TO EXTEND THE SAME RIGHTS TO NON-CITIZENS INCREASES TERRORISM**

David Cole, Professor, Georgetown University Law Center, Stanford Law Review, May, 2002, 54 Stan. L. Rev. 953, p. 985

In addition to the constitutional and normative reasons for according aliens living here the same basic rights that we insist upon for ourselves, our interest in security argues in favor of doing so. When law enforcement fails to abide by the basic dictates of political freedom, due process, and equal protection, it almost inevitably surrenders legitimacy, and thereby triggers a reaction in the targeted community that will ultimately create further problems. In the "war on terrorism," this loss of legitimacy has implications both at home and abroad.

## **Differences Grounded in Citizenship Generally Suspect**

**globalization has minimized the difference between “citizens” and “non-citizens” meaning there is no justification for discrimination**

Sarah P. Herlihy, J.D. Chicago-Kent College of Law, 2006, Chicago-Kent Law Review, Lexis, Although discrimination between natural born and naturalized citizens has existed since the ratification of the Constitution, globalization dictates that we amend the natural born citizen clause now because discriminating against naturalized citizens in favor of natural born citizens is no longer justified. In 1789, the Founding Fathers presumably included the natural born citizen clause because they were afraid of a foreigner becoming president. n36 They were allegedly afraid that a person who was born abroad, in a foreign culture, and with foreign influences would come to America, become president, and take over the country. Today, unlike in 1789, discriminating against naturalized citizens based solely on the fact that they were not born in the United States is no longer justified because globalization has lessened the differences between natural born citizens and foreign-born citizens. The increase in travel, the growth of international economic markets, and the increase in the number of people who are multi-lingual contribute to making people in the world more similar. Globalization is breaking down the differences amongst cultures because people throughout the world now have access to the same information, buy and sell the same products, and frequently travel or move out of their "home" countries during their lifetimes. Accordingly, the natural born citizen requirement no longer serves the same purpose that it did in 1789 when travel was extremely limited and foreign cultures were, in many cases, very different than the culture in America.

### **BIRTHPLACE IS NO LONGER A PROXY FOR A PERSONS BELIEF – GLOBALIZATION MAKES DIFFERENCES INDISTINGUISHABLE**

Sarah P. Herlihy, J.D. Chicago-Kent College of Law, 2006, Chicago-Kent Law Review, Lexis, Ultimately, the natural born citizen requirement is illogical because it requires a person's birthplace to act as a proxy for determining an individual's loyalty to America. Birthplace may at one time have been a more accurate indicator of persons' loyalty to their native country than it is today because 200 years ago people rarely moved from one country to another. In today's world, people are much more likely to move from one country to another and to raise their children in a country different from the country that is their homeland. This increased movement of people in the world and the resulting lack of differences between cultures decreases the effectiveness of using a person's place of birth as an indicator of that person's loyalty. n45 Accordingly, the natural born citizen provision should be repealed because it does not determine whether a person is a loyal American and therefore does not provide insight into whether a person should be eligible for the presidency.

### **THE TOOL OF CITIZENSHIP AS ETHNIC DISCRIMINATION IS USED TO SINGLE OUT AND EXCLUDE THOSE WHO ARE DIFFERENT OR THREATEN OUR IDENTITY.**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 55-6

The history behind cultural politics and our seeming inability to resolve the conflicts they present is entangled with and shadowed by that of other groups and their rights struggles. To return to Marshall here, we should begin with an idea of citizenship as an exclusionary practice. The first principle of exclusion was class: franchise and citizenship were extended to only those with property. The second principle of exclusion was gender: women were denied the franchise. The third principle was ethnic and religious. In England, Canada, and the United States, the earliest exclusion was of Catholics and, more quietly, the Jews. Slavery within the British Empire (and others) and the post-Revolution United State clearly established a racial hierarchy of citizenship, where race began to evolve from a religious ideology to a purely “biological” one. Thus, Asian immigrants to North America too, were similarly excluded from citizenship. In the United States, they were ineligible by virtue of their color, and remained ineligible even after 1890, when African Americans gained the right to citizenship. In both Canada and the US, they were banned from voting and owning property, and subjected to discrimination, rioting and other violence. Even the most rudimentary review of the “justice” experienced by any of these groups demonstrates that none received equal treatment before the law. Certainly, there is an argument that many do not receive such treatment today. As argued in Chapter 1, modern citizenship has always been allocated only to select groups, despite its universal language.

What was the purpose of such exclusionary legislation? We would argue that it is a reflection of an imperialist practice that found its strongest expression in citizenship to mark out the Other. Such a practice includes the categorization of land as “territory” and people as “races.” Both presuppose ownership and control. At the core of this practice is an invented hierarchy of peoples and nations that attempts to justify the claiming of land and the subjugation of peoples previously foreign to the conqueror. It was from and within imperialism that nations were born, not only as a means to overthrow oppressive empires (Said, 1993). Nations were established and governed by similar groups and classes that had launched empires. As power moved increasingly from monarchies to corporations, the nation-state became the most efficient means by which to solidify and from which to defend modern capitalism. Thus, the trinity

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of nationalism, capitalism and imperialism was eventuated with the state. Again, we return to the idea of nations as owned and defined by the few and that these few established for themselves a clear idea of who met the standard and who did not. This history, although well documented and known to most historians and other scholars, is frequently implicitly silenced by the manner in which new social movements today are discussed. Cultural politics, in particular, is described as something new and unique to the late twentieth century. Typically, David Morley and Kevin Robins (1995) suggest that the current identity crisis is a product of postmodern globalization, rather than a problem deeply rooted in modernity and merely exposed under the postmodern condition.

## **“Citizenship” Entrenches Patriarchy**

### **“CITIZENSHIP” IS A PATRIARCHAL CONSTRUCT**

Luis F. B. Plascencia, PhD Dissertation, University of Texas, 2005, Constituting Citizens, ‘Mexican Migrants’ and the Discourses and Practices of US Citizenship,  
<http://www.lib.utexas.edu/etd/d/2005/plascencial42810/plascencial42810.pdf>, p. 74-5

Feminist analyses developed by authors such as the above and others have made significant and important contributions to our understanding of citizenship. Through the careful analysis of the writings of Aristotle, Hobbes, Locke, Machiavelli, Marx, Plato, and Rousseau, as well as those by Hannah Arendt, Jurgen Habermas, and Michel Foucault and others, feminist scholars have argued that the standard readings of these writings and of key concepts such as democracy, social contract, “men,” “individuals,” and citizen must be read differently. These concepts, it is argued, are not neutral, universal categories; they are explicitly or implicitly embedded in masculinist and patriarchal political structures. An earlier statement by Carole Pateman summarizes this as follows:

feminism challenges the patriarchal construction of modern political theory...The feminist challenge is particularly pressing in the case of radical democratic theory which argues for the active participation of all citizens, but has barely begun to acknowledge the problem of women’s standing in a political order in which citizenship has been made in the male image. Democratic theorists have not yet confronted the implications of the patriarchal construction of citizenship (1989:14).

Commenting on the contribution of feminist, Iris Marion Young observes:

Feminist in particular have analyzed how the discourse that links the civic public with fraternity is not merely metaphorical. Founded by men, the modern state and its public realm of citizenship paraded as universal value and norms that were derived from specifically masculine experience: militarist norms of honor and homoerotic camaraderie; respectful competition and bargaining among independent agents; discourse framed in unemotional tones of dispassionate reason (1989[1998]:266).

### **SHOULD REJECT POLICY TREATMENT BASED ON CITIZENSHIP GIVEN ITS GENDERED CONTEXT**

Ruth Lister, Professor of Social Policy, University of Loughborough, 2001, Citizenship and Gender,  
<http://www.socsci.auc.dk/cost/gender/Workingpapers/lister.pdf>, p. 2

For some, the historically gendered nature of citizenship, together with its inherently exclusive tendencies at the boundaries of nation states [cross ref Soysal], renders it a concept of little value for contemporary feminism. This rejection of the very concept of citizenship is rarely articulated in print, although Gillian Pascall (1993) expresses deep ambivalence about a concept which is so problematic for women. Likewise, Anne Phillips has warned that ‘in a period in which feminism is exploring the problems in abstract universals, citizenship may seem a particularly unpromising avenue to pursue’ (1993, p87). Nevertheless, it is an avenue which has become positively crowded by feminist scholars, in a wide range of countries, intent on regendering citizenship from the standpoints of women (for an overview, see Voet, 1998).

## **“Citizenship” Entrenches Hierarchy**

### **CITIZENSHIP REINFORCES CLASS DICHOTOMIES, CREATING PROPERTY RIGHTS AND ESTABLISHING SELF-SUFFICIENT SUBJECTS.**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 28

In contrast to the first type (class as social order or status), Marshall argued that citizenship did not conflict with a second type of class, which we might call “modern class”. On the contrary, as we have discussed briefly above, civil and political rights were in fact necessary to the development of capitalism and its class system by giving each adult male the right to engage as an independent class system by giving each adult male the right to engage as an independent agent in economic struggle. Civil citizenship made class differentiation less vulnerable to attack by alleviating its less defensible consequences. Citizenship “raised the floor-level in the basement of social edifice, and perhaps made it rather more hygienic than it was before.” In short, civil rights did not conflict with the inequalities of capitalist society but were necessary to the maintenance of that particular form of inequality.

According to Marshall citizenship requires a different bond than kinship; it is a direct sense of polity based on loyalty to a civilization, which is a common possession. It is the loyalty of free men endowed with rights and protected by a common law. The growth of citizenship is stimulated both by the struggle to exercise those rights and by their enjoyment when won. It is significant that the core of citizenship at this stage was composed of civil rights. Differential status associated with orders, rank and family was not eliminated in society; rather, such status was replaced by the institution of citizenship. This provided the foundation of status equality – equality of opportunity – on which the structure of class inequality could be built. Modern citizenship conferred the legal capacity to strive for the things one would like to possess but did not guarantee the possession of any of them: “a property right is not a right to possess property, but a right to acquire it, if you can, and to protect it, if you can get it.”

The end of the nineteenth century brought the incorporation of social rights into the status of citizenship, for which Marshall singles out three reasons. First, he argues, was the rise of egalitarian principles, which were expressed in the expansion of social citizenship. He identifies a growing interest in equality as a principle of social justice and an appreciation of the fact that the formal recognition of an equal capacity for rights was insufficient. Second was the rise of real incomes, which closed the gap between classes. Third was the development of mass production and the widespread incorporation of the working class in mass consumption, which we shall later elaborate as Fordism in Chapter 6. The expansion of social citizenship created a universal right to real income which is not proportionate to the market value of the claimant. Marshall argues that the incorporation of social rights had a profound effect on class inequality. The reduction of class conflict was still the aim of social rights, but it had acquired a new meaning: “It is no longer merely an attempt to abate the obvious nuisance of destitution in the lowest ranks of society. It has assumed the guise of action modifying the whole pattern of social inequality.” Moreover, “the political rights of citizenship, unlike the civil rights, were full of potential danger to the capitalist system, although those who ere cautiously extending them down the social scale probably did not realize quite how great the danger was.”

### **CITIZEN-BASED EXCLUSIONS SUCH AS THOSE FOUND IN US NATIONAL SERVICE PROGRAMS ENTRENCH POWER HIERARCHIES OF THE STATE**

Luis F. B. Plascencia, PhD Dissertation, University of Texas, 2005, Constituting Citizens, ‘Mexican Migrants’ and the Discourses and Practices of US Citizenship,

<http://www.lib.utexas.edu/etd/d/2005/plascencial42810/plascencial42810.pdf>, p. 140

In summary, this chapter has sought to contextualize citizenship in the United States through an examination of the ongoing political actions on the part of the federal, state and local government, and labor unions to privilege U.S. citizens and augment the valuation of citizenship. This move of inclusiveness, it is suggested, transforms citizenship into a kind of ‘special-privilege monopoly.’ However, like all monopolies, the privilege bestowed on one entity comes at a cost to another entity. In the case at hand, the privilege and inclusiveness granted to citizens is inseparable from the disadvantages imposed on non-citizens—part of the power relations within which both citizens and noncitizens are embedded in.

The subjectivation of both non-citizen and citizen is grounded within the dynamic created by the inclusion/exclusion process. The citizen takes for granted her/his juridical citizenship and the privileges it allows, without necessarily recognizing how they are forged. In other words, he/she misrecognizes the social relations in the fundamental concept of “citizen.” Moreover, there seems to be a tacit acceptance of the difference that separates her/him from the “non-citizen.” Citizens are involved in requesting, promoting, and legislating the exclusion of non-citizens. The ‘natural-born’ citizen naturalizes his/her citizenship.

### **THE POLITICS OF EXCLUSION IN WHICH NATIONAL SERVICE HAS BEEN ROOTED IS VIOLENT AND IMPERIALIST AND MUST BE CHALLENGED.**

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Engin F. **Insin & Patrick K. Wood, York University, 1999**, Citizenship and Identity, p. 55-6

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#### **METHODS OF CONFERRING CITIZENSHIP IN THE STATUS QUO ARE INHERENTLY EXCLUSIONARY AND RACIST- CITIZENSHIP IS ONLY PASSED ON TO THOSE WHO ARE OF THE DOMINANT CULTURE, ETHNICITY, AND HERITAGE**

**Westin, Professor of Migration and Ethnicity Studies at Stockholm University, 2001**, (Charles, Citizenship and Identity, <http://www.ceifo.su.se/artiklar/Netarticlecw1.DOC>)

The two basic principles for conferring citizenship to newborn members of society by territory (soil) and by ancestry (blood)—*ius soli* and *ius sanguinis*—are principles of determining identity. The *ius sanguinis* principle relates citizenship to the basic category of ancestry/kinship. A child will receive the citizenship of its parents independently of where it is born. From an identity perspective this is a backward look, focusing on heritage, kinship, name, ethnicity, culture and possibly language. It is a principle of inclusion stressing generational continuity, but therefore at the same time a principle of exclusion. Those who do not meet the kinship/ethnic criteria will not automatically be included. There may even be a racist touch to ways in which inclusion and exclusion criteria operate.

#### **MOREOVER, A MODEL OF CITIZENSHIP FOUNDED UPON THE SPECIAL DETERMINATIONS OF THE NATION-STATE RELIES UPON A VIOLENTLY EXCLUSIONARY MODEL OF HUMAN RIGHTS. ONE IN DIRECT CONTRADICTION WITH THE RIGHTS RHETORIC OF UNIVERSALITY.**

[Engin F. **Insin & Patrick K. Wood, York University, 1999**, Citizenship and Identity, p. 67-8]

Wallerstein, however, considers liberalism as an ideology rather than a regime of government with technologies of power. To illustrate the alleged logical contradictions of liberalism is not adequate to address its practical inequalities. To accommodate this economy, the state had to address democratic ideals and practices in a controlled fashion. Human rights had to be seen to be practiced more than they were. For in fact, as Wallerstein explicitly demonstrates, human rights were not understood to be the possession of every human. From the ‘almost universally agreed’ denial of rights to infants, who do not possess ‘the mental capacity to exercise them wisely’, it has been too short a step to deny liberalism’s ‘fundamental human

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rights' to socially and economically marginalized groups, particularly ethnic and racial minorities, as illustrated earlier.

These restrictions were given their best articulation within the special framework of the nation-state. As noted earlier in this chapter, citizenship starts with location. The measurement of location changed with the political geography of the modern era: "The modern world-system created a legal and moral structure that was radically different, one in which the sovereign states, located within and constrained by an interstate system, asserted exclusive jurisdiction over all persons falling within their territory. Furthermore, all these territories were bounded geographically, that is, by surveyors' measurements, and were thus rendered distinct from other territories; in addition, no area within the interstate system was left unassigned to some particular state. Thus when "subjects were transformed into citizens and non-citizens (or aliens)." Immediately, there was a means by which to justifiably allocate rights to some and to deny rights to others, by virtue of the spatial determination of citizenship. The controlling valve came in the distinction between the fundamental rights themselves and "the politics of implementing them". It was through the process of implementation that liberals achieved the successful management of the contradiction between rhetoric and reality: the containment of the "dangerous classes." This implementation, this management, this containment, was achieved through the establishment of citizenship.

According to Wallerstein, "liberalism needed a constraining force" to justify the selective nature of the allocation of citizenship, and "that force was racism combined with sexism." Necessary as such a force may have been, it was equally necessary to disguise and deny such prejudice. "since both racism and sexism were by definition anti-universal and anti-liberal." The imperialist era gave liberals the mask of a savior: their racist views of "barbarous" peoples were articulated as a noble force of civilization, first religious, then political and economic (Holt, 1992, Said, 1993). Social scientists assisted the legitimization. But, as Said has astutely noted, the imperialists' "liberality was no more than a form of oppression and mentalistic prejudice" (Said, 1978; Wallerstein, 1995).

### **THE CRITICISM AND CONTESTATION OF CITIZENSHIP IS ONE THAT EVERYONE CAN JOIN IN—IT STRUGGLES AGAINST THE CENTRAL IDENTITY OF OPPRESSION**

Chandra Talpade Mohanty, professor of Women's Studies at Syracuse University, 2006 (Feb, US Empire and the Project of Women's Studies: Stories of Citizenship, Complicity, and Dissent; Gender, Place and Culture)

But perhaps another very important commonality is the commitment to a contested (perhaps even counter-hegemonic?) citizenship project—a project that lays bare the operation of state power and its effects on gendered/racialized bodies and communities around the world. A project that envisions citizenship in ways that challenge the normative construction of the white, male, heterosexual citizen-patriot. And perhaps it is this project that is at stake now as we confront empire. How do we in Women's Studies, and elsewhere craft a citizenship project that does not further the imperatives of empire? In other words, how do we theorize, analyze, and not reproduce the 'US nation' (and US empire) in the epistemological and political work we undertake in our markedly alternative fields? Failure to critique US empire allows feminist projects to be used and mobilized as handmaidens in the imperial project.

## **“Citizenship” Entrenches Nation-State System**

### **CITIZEN/NON-CITIZEN DISTINCTION FOR ALLOCATION OF RIGHTS FUNDAMENTAL TO THE NATION-STATE SYSTEM**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 67-8

Wallerstein, however, considers liberalism as an ideology rather than a regime of government with technologies of power. To illustrate the alleged logical contradictions of liberalism is not adequate to address its practical inequalities. To accommodate this economy, the state had to address democratic ideals and practices in a controlled fashion. Human rights had to be seen to be practiced more than they were. For in fact, as Wallerstein explicitly demonstrates, human rights were not understood to be the possession of every human. From the ‘almost universally agreed’ denial of rights to infants, who do not possess ‘the mental capacity to exercise them wisely’, it has been too short a step to deny liberalism’s ‘fundamental human rights’ to socially and economically marginalized groups, particularly ethnic and racial minorities, as illustrated earlier.

These restrictions were given their best articulation within the special framework of the nation-state. As noted earlier in this chapter, citizenship starts with location. The measurement of location changed with the political geography of the modern era: “The modern world-system created a legal and moral structure that was radically different, one in which the sovereign states, located within and constrained by an interstate system, asserted exclusive jurisdiction over all persons falling within their territory. Furthermore, all these territories were bounded geographically, that is, by surveyors’ measurements, and were thus rendered distinct from other territories; in addition, no area within the interstate system was left unassigned to some particular state. Thus when “subjects were transformed into citizens and non-citizens (or aliens).” Immediately, there was a means by which to justifiably allocate rights to some and to deny rights to others, by virtue of the spatial determination of citizenship. The controlling valve came in the distinction between the fundamental rights themselves and “the politics of implementing them”. It was through the process of implementation that liberals achieved the successful management of the contradiction between rhetoric and reality: the containment of the “dangerous classes.” This implementation, this management, this containment, was achieved through the establishment of citizenship.

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### **NON-CITIZENS OF THE NATION-STATE WOULD BE DEPRIVED OF THEIR HUMAN RIGHTS.**

Savic, Obrad; “Figures of the Stranger Citizen as a Foreigner”; Founding and active president of the belgrade circle, parallax, 2005, vol. 11, no. 1, pp. 73-74.

In the French Declaration of the Rights of Man and Citizen, the difference between the natural ‘rights of man’ and the political ‘rights of the citizen’ is left unclear.<sup>9</sup> (As Maribeau declared in the Constituent Assembly, ‘the Declaration was not a list of abstract wishes but an act of war against tyrants’. The Declaration proclaims the universality of rights, but their immediate effect is to establish the boundless power of the nation-state and its law. What distinguished the revolutionary from earlier forms of rights was the claim that a new type of nation-state organization was to be grounded on the recognition and protection of these rights: ‘From that point, statehood, sovereignty and territory follow the principle of nationality. If the Declaration inaugurated modernity, it also started nationalism and all its consequences: genocides, ethnic and civil wars, ethnic cleansing, minorities, refugees, statelessness. Citizenship introduced a new type of privilege, which was protected for some by excluding others – foreigners. Citizenship shifted exclusion from class to nation-state, which became a new historical barrier’.<sup>10</sup> By creating the distinction between human being and citizen, the Declaration acknowledged the tension between universal and local, between human rights and rights of citizenship. The conflict within the Declaration of rights for all humanity, which created the power of the National Assembly to establish these rights only for the French, introduced an element of exclusion in constitutional politics. From now on political legitimacy derives from the fact of legacy, from the fact that the legislator and the addressee of his commands (the legal subject) are one and the same. The essence of political freedom is that the subjects who make the law are also law’s subjects and are subjected to law. Democratic legitimacy and legislation are introduced on behalf of the citizens as ‘state people’, who participate in the creation of the general national will. Despite its generalization, the law of the nation-state excludes from the political community of its subjects all those foreigners who do not belong to the nation.



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They are subjected to the law but they are not law's subjects, and hence, they cannot participate in public and political life; these 'second-class citizens' represent additionally others, foreigners, aliens, immigrants and refugees who are lesser human beings because they are not citizens. The foreigner thus becomes (or represents) the gap between man and citizen, between general humanity and national politics. Thus it seems that the human being as individual being only has rights in their national community. For those who lack a political and national representation very little is left. The foreigners or strangers, the refugees, the stateless people, the minorities of various types, have no human rights. Human rights 'belong' only to the citizens of nation-state, and international law is consequently limited by treaties between sovereign states.

#### **NATION-BASED CITIZENSHIP IS OPPRESSIVE**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 20

A way to transcend the essentialist and constructivist conceptions of identity in modern political and social theory is to develop a sound conception of "group." As Iris Young (1990) has observed, our conceptions of social group are remarkably underdeveloped. In other words, the fixed and stable boundaries or identity have become contested by new identities and their fluidity (but also their new rigidity) and raised questions about the nature of social groups. Some have argued that the politics of identity has fragmented the political strength of groups based upon class. In this view, for the purpose of accentuating differences, identity politics weakened the 'common bond' among various oppressed and subordinated groups. Moreover, identity politics may have served to mask class conflicts underlying major struggles. The proponents of identity politics, however, charge that finding common ground under 'master identities' such as 'class' or 'nation' often ends up being a strategy of oppression and leveling or differences. How could a conception of politics recognize and respect group difference but allow for building alliances and blocs to struggle for rights?

## **“Citizenship” Entrenches Capitalism**

### **CITIZENSHIP EXCLUSIONS ARE A BASIC REQUIREMENT OF CAPITALISM**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 67

It is not the nation-state as a collective that needs liberalism and its supposed individual rights; it is modern (and advanced) capitalism that needs to exclude collective rights. It is capitalism that needs hierarchies of imperialism to naturalize the inequalities that markets produce and entrench. It is capitalism that needs the façade of citizenship, no deeper than rhetoric, to buy the loyalty of workers. As Immanuel Wallerstein has articulated, the two faces of liberalism are integral to its success. Arguing that liberalism ‘became the geoculture of the modern world-system in the nineteenth and twentieth centuries,’ Wallerstein asserts that this geoculture “is not only logically self-contradictory, but the insurmountable contradiction it presents is itself an essential part of the geoculture” (Wallerstein 1995: 1162). Wallerstein seems to appreciate the way in which postmodernism is implicit in, or at least the inevitable outcome of modernism. As he argues, the democratic principles established by the French Revolution had implications that, if realized, could seriously challenge the capitalist world-economy which had, of course, worked without democracy for a couple of centuries. “Far from ensuring the legitimacy of the capitalist world-economy” he writes, “these principles threatened to delegitimize it in the long run.”

## **AT: “Military Tribunals Provide Non-Citizens with Due Process Protections**

### **MILITARY TRIBUNALS DO NOT AFFORD SAME LEVEL OF DUE PROCESS**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 225-6  
There were some elements of due process in the tribunal proceedings. Defendants would be presumed innocent, would be given notice of charges before trial, and would not have to testify against themselves, with no presumption being drawn from their refusal. They could choose their own counsel if they could afford it or military counsel if they could afford it or military counsel would be provided for them, although until November 2004 any meetings with counsel were videotaped. The burden of proof would remain with the government. Defendants could call witnesses in their defense. They could see the evidence presented by the government. Trials might be opened to the media. Two-thirds of the three- to seven-member panel would have to vote to convict. Guilty verdicts could be appealed to an independent appeals board on which civilians might serve. But in many respects due process protections were lacking. No definition of “international terrorism” was provided in the order or in subsequent regulations. Group association and membership, rather than commission of concrete acts, could be the basis for detention and trial, and there was no requirement of “probable cause” that a crime had been committed. A person could be charged and tried solely at the discretion of the president, without any judicial review of that decision. (In civilian criminal proceedings, the Fourth Amendment requires a prompt judicial determination of probable cause after an arrest has been made, usually defined as 48 hours). Anyone charged could be held indefinitely at any location in the world. The president would appoint all the judges, prosecutors, and military defense lawyers.

### **MILITARY COMMISSIONS LACK MANY OF THE DUE PROCESS PROTECTIONS AVAILABLE IN CRIMINAL COURTS**

Eugene Fidell, **Senior Research Scholar in Law** and Florence Rogatz **Lecturer in Law, Yale Law School**; President, National Institute of Military Justice, *New York Law School Law Review*, **2011 / 2012**, “Ten Years On: Military Justice and **Civil Liberties** in the Post-9/11 Era,” p. 108-110

Many concerns have been expressed about the use of military commissions. Should the strict rules of evidence apply, as they do in courts-martial? Should evidence obtained by coercion short of torture be admissible? Should evidence obtained without *Miranda* warnings be admitted? What restrictions should be imposed on the media in attempting to cover military commission trials? But one of the biggest issues concerning military commissions relates to the fundamental question of whether the so-called “high-value detainees”—those directly involved in the 9/11 attacks—should be prosecuted before a commission in Guantanamo or in the federal courts. The Obama administration has wrestled with this, offering in 2009 a set of guidelines for distinguishing the two categories of cases. Attorney General Eric H. Holder, Jr. was widely criticized in 2009 when he announced that half of the high-value detainees would be tried in the U.S. District Court for the Southern District of New York. He seemed to recede from this position when local officials in lower Manhattan objected, and the proposal seemed doomed when New York City Mayor Michael Bloomberg joined in the objections, citing what seemed to be a wildly inflated cost estimate for courthouse and lower Manhattan security. It is telling that when Ahmed Khalfan Ghailani was brought from Guantanamo to the Southern District for a civilian federal trial, the New York Police Department sought no financial assistance to bolster security around the Foley Square courthouse. In the end, the high value detainees were slated for military commission trials. What is the civil liberties interest? Since the Civil War, it had been widely understood that military courts could not be used to prosecute civilians when the local courts were open and transacting business. The Supreme Court applied this doctrine to curtail—after the fact—the use of military courts in the then Territory of Hawaii in 1946 after the threat of Japanese invasion had passed. Trial in federal district court affords a variety of constitutional protections not known to military commissions or courts-martial, such as indictment by grand jury and trial by a randomly drawn twelve-member jury of one's peers. It also guarantees an independent judge protected by life tenure. In contrast, military commission jurors are handpicked and the presiding judges lack secure tenure required for judicial independence.

### **TERRORISM SHOULD BE DEALT WITH IN CRIMINAL COURTS—NOT MILITARY TRIBUNALS**

**Military Attorneys Assigned to Defense in the Office of Military Commissions**, Amicus Brief, *Al Odah v US*, 2003 U.S. Briefs 343, January 14, **2004**, p. 20

Crimes of terrorism are similar to *Lamdin Milligan's offense of trying to overthrow the government*, as to which this Court said there was “no reason of necessity” for a military trial “because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.” 71 U.S., at 122. Conversely, crimes of terrorism are dissimilar to *Lothar Eisentrager's offenses*, for there the Court emphasized that he would go unpunished if a commission could not bring charges. *Eisentrager*, 339 U.S., at 782-83.

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## **AT: “Public Checks Abuses”**

### **PUBLIC TOLERATES POLICIES WHICH RESTRICT LIBERTY OF NON-CITIZENS**

Elizabeth M. McCormick, William R Davis Clinical Fellow-University of Connecticut School of Law, Connecticut Journal of International Law, Spring, 2004, 19 Conn. J. Int'l L. 423, p. 435

Before beginning a lengthy discussion of the United States' appalling history of selectively targeting the aliens among us for a loss of rights and liberties, Cole explains that ambivalence toward non-citizens has run deep in the American psyche for generations. While on the one hand a nation of immigrants, proud of our heritage and diversity, at the same time there exists a general suspicion of immigrants, "based on their racial, religious, and ethnic difference, and their radical associations and ideas." n60 As a result, "we have incarcerated and deported foreign nationals for their ideas, their beliefs, and the company they keep, while employing summary procedures to do so." n61 These measures were, according to Cole, initially uncontroversial precisely because they were targeted at foreign nationals, a group easily and frequently demonized in times of crisis. "Only when the government's tactics affected a sufficiently large number of citizens did the country recognize the errors of its ways." n62

## **AT: “Citizenship Generally Good Arguments”**

### **MANY FORCES CONVERGING TO DESTABILIZE TRADITIONAL NOTIONS OF CITIZENSHIP**

Saskia Sassen, Department of Sociology, University of Chicago, 2004, The Repositioning of Citizenship: Toward New Types of Subjects and Spaces for Politics, Campbell Public Affairs Institute, April 30, <http://www.maxwell.syr.edu/campbell/Library%20Papers/Event%20papers/TransCitizenship/Soysal.pdf>, p. 4-5

As these trends have come together towards the end of the twentieth century they are contributing to destabilize the meaning of citizenship as it was forged in the nineteenth and much of the twentieth centuries. Economic policies and technical developments we associate with economic globalization have strengthened the importance of cross-border dynamics and reduced that of borders. The associated emphasis on markets has brought into question the foundations of the welfare state. T.H. Marshall (1977 [1950]) and many others saw and continue to see the welfare state as an important ingredient of social citizenship. Today the assumptions of the dominant model of Marshallian citizenship have been severely diluted under the impact of globalization and the ascendance of the market as the preferred mechanism for addressing these social issues. For many critics, the reliance on markets to solve political and social problems is a savage attack on the principles of citizenship. Thus Peter Saunders (1993) argues that citizenship inscribed in the institutions of the welfare state is a buffer against the vagaries of the market and the inequalities of the class system.

The nature of citizenship has also been challenged by a proliferation of old issues that have gained new attention. Among the latter are the question of state membership of aboriginal communities, stateless people, and refugees (Sassen 1999; Knop 2002). All of these have important implications for human rights in relation to citizenship. These social changes in the role of the state, the impact of globalization on states, and the relationship between dominant and subordinate groups also have major implications for questions of identity. “Is citizenship a useful concept for exploring the problems of belonging, identity and personality in the modern world?” (Shotter 1993; Ong 1999: Chapters 1 and 4). Can such a radical change in the conditions for citizenship leave the institution itself unchanged?

### **CONCEPT OF CITIZENSHIP IS BEING CHALLENGED NOW**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 6

Today citizenship is widely debated both among scholars and political leaders (Beiner, 1995; Kymlicka and Wayne, 1994; Shafir, 1998; Steenbergen, 1994; Tilly, 1996; Turner, 1993a). The boundaries and the meaning of modern citizenship are currently being challenged. Why has modern citizenship been contested? Our era has been variously described as ‘postmodern’, ‘global’ or ‘late modern.’ Whatever the merits of such definitions and declarations, the fact that they point to transformations in economy, culture and society is important, that they point to transformations in economy, culture and society is important. As Benhabib says, ‘our lived time, time as imbued with symbolic meaning, is caught in the throes of forces of which we only have a dim understanding at the present. The many ‘postisms’, like posthumanism, post-structuralism, postmodernism, postfordism, post-Keynesianism, and post-Histoire circulating in our intellectual and cultural lives, are at one level only expressions of a deeply shared sense that certain aspects of our social, symbolic and political universe have been profoundly and most likely irretrievably transformed’ (Benhabib, 1992:1). During such transformation, citizenship defined as both practice and status becomes a field of contest. And, when there is such a contest in the field of political and social power, of course, a similar contest takes place in the field of theory and ideas.

### **CITIZENSHIP HAS FADED INTO LEGAL TERMINOLOGY AND IS NO LONGER A CLEAR-CUT, VIABLE IDENTITY**

Melissa Bass, Brandeis University, 2003, Civic Education Through National Service: Lessons from American History, Paper presented to the International Conference on Civic Education Research, <http://civiced.indiana.edu/papers/2003/1052190098.pdf>, p. 4

For a number of reasons, being a citizen is not an identity that people strongly claim in their everyday lives. “Citizen” is usually – and both importantly and problematically – reserved to describe a constitutional legal status: people born or naturalized in the United States are American citizens. Citizenship from this first perspective is located in the state and encompasses a set of legal rights – the right to vote, freedom of speech, qualification for certain benefits, and so on – and obligations – to follow the law, pay taxes, serve on juries, and the like – that undergird constitutional democracy. So central are some of these rights and duties of “citizenship” that they are not always limited to legal citizens. Even from a constitutional perspective, and even more so from other perspectives, the definition of citizenship is not clear-cut.

## **AT: “Citizenship Key to Shared Sense of Community”**

### **US USES “CITIZENSHIP” TO MARK POSITIONS OF PRIVILEGE AND ESTABLISH POWER RELATIONS**

Luis F. B. Plascencia, PhD Dissertation, University of Texas, 2005, Constituting Citizens, ‘Mexican Migrants’ and the Discourses and Practices of US Citizenship,

<http://www.lib.utexas.edu/etd/d/2005/plascencial42810/plascencial42810.pdf>, p. 4-5

Why is citizenship important? Citizenship, particularly in its juridical sense, is an object of interest to academics and individuals because it is embedded in contexts involving power relations. And its effects within national and local power relations have direct and immediate impact on the political status and material interests of individuals. In particular, in the United States, one’s ability to assert the identification of “U.S. citizen” has important political and economic consequences on the well being of individuals and families. Historically, it marks a position of privilege with reference to political actions (e.g., voting, serving on juries, holding elected office, testifying against accusers); property rights (e.g., owning land, receiving an occupational license, operating a business, being employed by the federal government); as well as a wide range of other privileges such as receiving an educational loan, the right to not be deported/removed.<sup>11</sup> The removal/departure of Yasir Esam Hamdi to Saudi Arabia and the condition requiring that he renounce his U.S. citizenship, however, suggests that there is some instability to this last right.

### **CITIZENSHIP CONSTRUCTED TO FOSTER EXCLUSION**

Luis F. B. Plascencia, PhD Dissertation, University of Texas, 2005, Constituting Citizens, ‘Mexican Migrants’ and the Discourses and Practices of US Citizenship,

<http://www.lib.utexas.edu/etd/d/2005/plascencial42810/plascencial42810.pdf>, p. 5-6

Citizenship, it is argued here, simultaneously fosters exclusion and inclusion. In terms of inclusion, it promotes and invokes an imaginary solidarity, in the sense used by Cornelius Castoriadis (1975 [1987]) and Benedict Anderson (1983), by emphasizing shared membership in a nation-state. As citizens of a particular nation-state, individuals are expected to have affective ties to that nation, and be concerned with its well-being, as well as possessing a willingness to kill and die for it. Through federal statutes specifying how an “alien” or “foreigner” (“*extranjero*”) can “naturalize” (i.e., be granted most of the privileges of a “natural-born” person),<sup>12</sup> individuals can petition and receive the citizenship of the particular nation—i.e., be formally included as a member of that nation-state. Its inherent variability and contestation, it is suggested, makes it important to consider it more as an “instituted process” than a status.

### **CITIZEN/NON-CITIZEN BINARY EMBODIES THE SAME POWER IMBALANCE AS MASTER/SLAVE**

Luis F. B. Plascencia, PhD Dissertation, University of Texas, 2005, Constituting Citizens, ‘Mexican Migrants’ and the Discourses and Practices of US Citizenship,

<http://www.lib.utexas.edu/etd/d/2005/plascencial42810/plascencial42810.pdf>, p. 40-1

Who is a U.S. citizen? Prior to specifying the juridical construction of this term, we must first define a second term: “alien.” In the first section of the INA (Sec. 101, “Definitions”), the third term listed is “alien”: “The term “alien” means any person not a citizen or national of the United States.” “Citizen” is not included in the Definitions section.<sup>39</sup> It is not until Section 301 (titled “Nationals and Citizens of the United States at Birth”) and subsequent sections, that “nationals and citizens” are specified. Section 301 begins with “The following shall be nationals and citizens of the United States at birth,” then specifies eight conditions; what most of the citizenship literature refers to as rights related to *jus soli* and *jus sanguinis*—nationality/citizenship based on land or blood.<sup>40</sup> What is important is that ultimately a “citizen” is defined as a person who is not an “alien,” and an “alien” is a person who is not a “citizen.”

The asymmetric counter-concepts or opposition of “alien-citizen” (without suggesting any sense of an universal binary opposition), and the inherent political contestation that the opposition has historically evoked, suggests that Hegel’s discussion of the power relations in a “Master and Slave” relationship (also sometimes translated as lordship and bondage, or master and servant) is applicable here.<sup>41</sup>

### **CITIZENSHIP IS NOT AN IDENTITY IN AND OF ITSELF; RATHER, IT FACILITATES IDENTITY, GIVES THE APOLITICAL NATURE OF IDENTITY A POLITICAL VOICE**

Engin F. Insin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 19-20

There are differences and affinities between concepts of citizenship and identity that generate significant problems in addressing both. In terms of differences, citizenship is more of a concept of status than identity. It is expressed in juridical and legal norms that define the rights of the members of a polity. Many scholars argue for a concept of citizenship broader than a juridical and legal status but these arguments do not change the

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basic fact that ultimately citizenship allows or disallows civil, political and social rights and obligations in a polity. Such arguments for active citizenship or deep citizenship are concerned with deepening the scope of citizenship but they nevertheless presuppose that the status of citizenship already exists.

While identity does not need to have a legal and juridical basis, it may become the subject of legal dispute and struggle. Although identity formation is a process that begins outside the purview of legal rules and regulations, it is often quickly drawn into the legal field. This is also its strength. “Identity” is a concept that presupposes a dialogical recognition of the other; it is relational concept. But it is also a concept that presupposes identification in the sense that individuals recognize attributes or properties in each other that are construed as identical or at least similar. These properties, then, are used as an index of individual position and disposition. Identity is therefore a concept not so much of uniqueness or distinction as of resemblance and repetition (Jenkins, 1996). By contrast, an individual is a distinct assemblage of identities. Thus, individuality should be kept distinct from identity. When we use the concept identity we inevitably invoke a classification that places and positions an individual within a social space by virtue of his or her various identities.

Thus, the formation of group identity is a process whereby individuals recognize in each other certain attributes that establish resemblance and affinity. This becomes the basis of identification whereby individuals actively produce and reproduce equivalent dispositions. The dialogical process of recognition is an ongoing negotiation of habituating, inculcating, defining, redefining, and reproducing these dispositions. Identity allows for the effective formation of groups which sometimes but not necessarily may lead to claim for legal entitlements. Although identity too can become a status concept, especially a social status, it should rather be thought as the basis of recognition demanded by groups excluded from the scope of citizenship. In other words, groups do form out of individual properties and attributes that pre-exist groups. On the contrary, individual attributes of identity are formed via the group. But, at the same time, individual attributes can only form under material constraints. There are limits to both essentialist and constructivist views of identity in that they conflate individual and group identity. The affinity between citizenship and identity is that they are both group markers. Citizenship marks out the members of a polity from another as well as members of a polity from non-members. Identity marks out groups from each other as well as allowing for the constitution of groups as targets of assistance, hatred, animosity, sympathy or allegiance. As group markers the difference between citizenship and identity is that, while the former carries legal weight, the latter carries social and cultural weight.



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### **\*Due Process Impacts\***

## **Due Process Key to Protect the Innocent**

### **DUE PROCESS PROTECTIONS CRITICAL TO PROTECT THE INNOCENT**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 14

Similarly, consider the case of three Muslim medical students who were stopped on a Florida highway in Collier County after a waitress at a rest stop overheard them talking about the anniversary of the September 11 attack, and thought that they were talking about planning a terrorist action. They were charged with running a tollbooth and were held 18 hours for investigation, as trained dogs and a robot searched their car for evidence of explosives. The men were released after nothing was found and after a videotape revealed that they had not un the tollbooth; had the men not had access to counsel, or had they been detained indefinitely without access to lawyers by federal officials convinced that they were terrorists, they could have languished in jail indefinitely, and highway patrols around the country would have continued to look for terrorists on the roads, raising anxieties but doing nothing to allocate local law enforcement resources effectively.

### **DUE PROCESS PROTECTIONS CRITICAL TO PROTECT INNOCENT PEOPLE ACCUSED OF TERRORISM**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 14-5

In other cases the due process model has proven its value, as initial determinations or evidence turned out to be worthless when challenged by lawyers. Brandon Mayfield, 37, a respected immigration lawyer (and a former lieutenant in the Army) in Oregon who was a convert to the Muslim religion, was taken away from his Portland law office on a material witness warrant by FBI agents on May 6, 2004, after his fingerprint was incorrectly matched by agents to a digital copy of one fingerprint found on a bag of detonators near a Madrid train station. (A material witness is someone who there is probably cause to believe has evidence of the commission of a criminal act). A few months earlier, horrific terrorist train bombings in Spain had killed 191 people and injured about 2,000. Spanish police had collected a fingerprint and sent "Latent Fingerprint No. 17" to the FBI, whose Latent Print Unit matched it against its Automated Fingerprint Identification System database. Of 20 possible matches, a senior fingerprint examiner found a "100 percent" match with the fourth-ranked print on the list, Brandon Mayfield. Other FBI examiners concurred. The FBI sent a letter to the Spanish authorities informing them of the identification of Mayfield, but the Forensic Science Division of the Spanish National Police responded the FBI that the purported match was "conclusively negative." So sure were FBI investigators, they didn't look at the original fingerprints when they went to Spain to meet with Spanish investigators. After arresting Mayfield, FBI agents went into his home in Aloha, Oregon, and seized computers, a modem, a safe deposit key, and assorted papers, as well as copies as the Quran and "Spanish documents"—later determined to be his son's Spanish homework. The FBI admitted its mistake after agents returned to Madrid and viewed the original fingerprint, which turned out to match with an Algerian man in Spain. They then released Mayfield, but indicated he remained a material witness. A week later a court reviewed that determination and lifted the restrictions.

### **PROSECUTORIAL OVERREACH AND ERROR MORE LIKELY IN CASES INVOLVING TERROR SUSPECTS**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 16-7

Adhering to due process of law not only protects the accused but also helps guard against prosecutorial zeal that sends false signals about who is a terrorist and what terrorists might be doing. The issue of prosecutorial zeal surfaced in a case involving Karim Koubriti and Abdel Ilah-Elmardoudi, two Moroccan men who were in custody for three years, charged with terrorist activities, and convicted in June 2003 of conspiring to provide material support to terrorists by casing targets in Las Vegas and at Disneyland. Six days after the September 11 attacks, seven FBI agents raided an apartment on Norman Street in southwest Detroit, hoping to find Nabil al-Marabh, number 27 on the FBI's terrorist watch list. At the apartment they found Koubriti. The raid also uncovered 28 passport pictures and forged immigration and identification papers, including employee badges for the Detroit Metropolitan Airport. Also found were expired security badges for the Detroit Metropolitan Airport caterer. The key piece of evidence against Koubriti was a day planner with two sketches prosecutors claimed were of military airplanes at an American air base in Turkey and a military hospital in Jordan, as well as tapes and sketches of the New York Times building and the MGM Grand Hotel in Las Vegas. An alleged accomplice, Ilah-Elmardoudi, was arrested about year later in connection with the alleged plot and for credit card fraud. The arrests, the first terrorism case after 9/11, were hailed by the Department of Justice as a major blow in the war on terrorism through the unraveling of a "sleeper operational cell." Attorney General John Ashcroft claimed the men had knowledge of the 9/11 attacks, a claim made in violation of a "gag order" issued by Judge Gerald Rosen to prevent pretrial publicity in the case. (Ashcroft was sanctioned by the judge and apologized to the court.) Justice

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Department officials, however, understood that the case was weak but felt that going ahead with a prosecution might pressure the defendants into giving up some useful information, perhaps on the whereabouts of al-Marabh. In the nine-week jury trial, the prosecutors claimed that these two men were part of an operational “sleeper cell” engaged in planning terrorist attacks. Witnesses from the FBI, Air Force, and State Department concurred. A Moroccan informant named Hmimssa claimed that the men used a code involving the names of Moroccan soccer players, tried to obtain Stinger missiles, and were thinking of shooting down passenger jets or staging a raid at a casino in Las Vegas. After the conviction, Attorney General Ashcroft called the conviction of two of the men “a clear message” that the government would “work diligently to detect, disrupt and dismantle the activities of terrorist cells.” A subsequent investigation on the case by the *Detroit Daily News* found that prosecutors ignored rules intended to ensure a fair trial and withheld more than 100 documents (over 1000 pages) from defense attorneys, as well as e-mails, lineup pictures, and interviews with witnesses. Prosecutors arranged for the deportation of two witnesses who would have testified for the defense. An FBI witness testified that evidence seized from the defendant’s apartment was “operational casing material,” but expert analysts at the CIA and Air Force had concluded that there was no basis for the claim, that the sketches provided no useful information, and that they did not appear to be the handiwork of terrorists—but their statements were not provided to the defense. The Las Vegas FBI submitted a report indicating that the sketch did not appear to be for surveillance, and a Tunisian student with the group said under FBI questioning that the men had been on a vacation to Las Vegas when they made the videotape. The lead prosecutor altered his notes of interviews of a witness before giving them to the court and did not inform defense attorneys. The government’s key witness, Youssef Hmimssa, told fellow prisoner Butch Jones that he had fooled the FBI and Secret Service, but this conversation, after Jones revealed it to the prosecution, wasn’t shared with the defense attorneys. Hmimssa had previously lied to investigators and had a record as a con artist and involvement with drug dealers, and so Hmimssa might have concocted a story implicating “the sleepers” so that he could win a favorable plea agreement in his own case.

## **Due Process/Equal Protection Key Check on Nazi Atrocities**

### **NAZI GERMANY PROVES THE DANGER OF USING THE LAW TO DEPART FROM PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION**

Richard D. **Fybel**, **California Court of Appeals Justice, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 25-6

Everything the Nazis did from 1933 through 1945, including mass murder and deprivation of all individual rights, was legal under the German legal system. This essay describes how Germany legalized murder and other criminal acts, and focuses on the acts of the judiciary and individual judges.

The German judiciary from 1933 through 1945 was ethically corrupt with its judges playing integral roles in the legal systems of Germany and its occupied countries. The lessons of this “legal barbarism” confirm the importance of the hallmarks of our American judiciary and its judges: impartiality, the rule of law based on our constitution, protection of individual liberties from government intervention, and the rendering of equal justice to all.

## **Due Process Key to Democracy**

### **PROTECTION OF DUE PROCESS RIGHTS CRITICAL TO DEMOCRACY**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 11

All of these rights not only protect common criminal defendants but also are essential to guarantee the integrity of a democracy. They inhibit the creation and use of a secret police force, protect against arbitrary arrest and indefinite detention, prevent torture and the “softening up” of prisoners, inhibit the creation of a class of brutal interrogators who may later be mobilized into death squads, protect against trumped-up political prosecutions, and prevent a “chilling effect” against dissident political movements. Without due process of law in criminal proceedings, the First Amendment guarantees of freedom of speech, petition, press, and even religion might not amount to much.

## **Rule of Law Impacts**

### **ABANDONMENT OF RULE OF LAW WOULD BE A CATASTROPHIC FAILURE**

Nils Melzer, Legal Adviser-International Committee of the Red Cross, 2008, Targeted Killing in International Law, p. 430

States involved in prolonged counter-insurgency and counter-terrorist campaigns may therefore be tempted to conclude that human rights law and international humanitarian law impose excessive constraints on their choice of operational means and methods, and to unilaterally adopt policies and tactics in defiance of the rule of law. Although the rule of law may not guarantee justice or absolute security, it remains the only safeguard against the descent of human society into anarchy governed by arbitrariness and brute force. While it may be permissible and even necessary to periodically challenge the adequacy of the law in force, it would be a catastrophic failure of civilization to allow the demise of the fundamental principle according to which collective power and authority must be exercised in accordance with predictable, reliable and generally binding rules.

### **THE RULE OF LAW IS CRITICAL TO CHECK OUR TENDENCIES TO IGNORE THE CONCERNS OF THE OTHER**

Robin West, Professor of Law, Georgetown University Law Center, 2000 (QUINNAPAC LAW REVIEW, Is the Rule of Law Cosmopolitan? p. 276)

We should also be suspicious of the deadening logic to which it leads: to claims of difference themselves traceable to the need to excommunicate and use, rather than equally regard, the lives or services of others. To guard against this, we should assume, and insist, and re-affirm, that those whose lives are affected by our actions are fundamentally, essentially and in material, emotional and biological ways like us, and act accordingly. The rule of law, and the mandate of legal justice it implies, might be best understood today as a bulwark - institutional, to be sure, but also deeply ingrained in our nature - against our human tendency to self-servingly do otherwise.

### **RULE OF LAW IS THE BASIS FOR DEMOCRATIC SOCIETY**

Charles I. Lugosi, Assistant Professor of Law, St. Thomas University School of Law, American Journal of Criminal Law, Spring, 2003, 30 Am. J. Crim. L. 225, p. footnotes

n17. I define the "rule of law" as government by laws that people of moral conscience are willing to obey because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. I define "rule by law" as the antithesis of the "rule of law," meaning to be governed in any society, including democratic societies, where the government may exercise arbitrary executive powers and may abridge at will constitutional civil liberties. The main difference between these opposite concepts is that justice is the defining characteristic in a society governed by "rule of law," and deferential obedience is the defining characteristic in a "rule by law" society.

## **Judicial Independence Impacts**

### **NAZI ATROCITIES FUELED BY LACK OF JUDICIAL INDEPENDENCE**

Richard D. **Fybel**, **California Court of Appeals Justice, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 34

Whatever the reason of combination of reasons, it is manifestly true that the German judges coordinated themselves into the Nazi system and were ethically corrupt. As succinctly stated by a leading scholar, Majer, the “principle of [the] rule of law [is] not compatible with that of authoritarian leadership.” As observed by Majer, judges became “*immediately answerable to the Fhurer.*” This reality “represented the climax of the destruction of judicial independence.”

## **\*Torture Impact\***



## **Viewing Terrorists as Distinct Legitimizes Torture**

### **OTHERIZATION OF TERRORISTS CREATES A TORTURE CULTURE**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 201

Alan Clarke argues that the demonization of any enemy, and the claim that some people are just “outside of the law,” are elements of the creation of a torture culture. “We inhabit a world of ‘us’ against ‘the evil-doers’ which permits a torture culture to take hold. Al-Qaeda becomes equated with pirates and slave traders to be dealt with or extirpated at will.” And as Eyal Press argues, torture is “a function not of brute sadism but of the willingness to view one’s enemies as something less than human.”

## **Extending Due Process Protections Decrease Torture**

### **DUE PROCESS PROTECTIONS PROHIBITS CONFESSIONS OBTAINED THROUGH WATERBOARDING/TORTURE**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 130

The announcement that KSM and others would be tried in conventional criminal trials was controversial, in part because of the “expansive protections” that are normally accorded to defendants in conventional criminal courts. Under either a Fifth Amendment or due process analysis, “waterboarded” confessions should prevent an easy case for exclusion. In a conventional criminal court, terrorism suspects may even be able to claim *Miranda* rights. I have argued elsewhere that *Miranda* both overprotects and underprotects in the terrorism context, and that terrorism suspects should not have the benefit of *Miranda* warnings. Even leaving aside the Court’s *Miranda* jurisprudence, however, a confession obtained by waterboarding at the hands of United States agents fails the due process inquiry. Since *Brown*, it has been well established that confessions obtained through torture should be categorically forbidden.

### **BAGRAM IS BEING USED TO CONTINUE THE LEGACY OF GUANTANAMO BAY—REFUSAL TO EXTEND THE LAW TO DETAINEES GUARANTEES ABUSE AND TORTURE**

**AMNESTY INTERNATIONAL**, 18 FEBRUARY 2009 [“USA: OUT OF SIGHT, OUT OF MIND, OUT OF COURT? THE RIGHT OF BAGRAM DETAINEES TO JUDICIAL REVIEW,”

[HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/AMR51/021/2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML](http://www.amnesty.org/en/library/asset/AMR51/021/2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML)]

The new administration has not yet said what its intentions are for US detentions in Afghanistan, in particular the long-term detention facility being operated by the US Department of Defense at

Bagram airbase, where hundreds of detainees are being held. In a Senate Armed Services Committee hearing on 27 January 2009, asked about the future of detentions in Bagram under the new administration, US Secretary of Defense Robert Gates confirmed that “we certainly continue to hold detainees at Bagram. We have about 615 there, I think, something in that ballpark”. New detentions by US and allied forces in Afghanistan have been occurring on a regular basis. For example, according to reports from the American Forces Press Service, at least 65 “militants” were taken into custody by coalition forces during January 2009.<sup>4</sup> Given that President Obama is committed to “refocus[ing] American resources on the greatest threat to our security – the resurgence of al Qaeda and the Taliban in Afghanistan and Pakistan” – including by substantially increasing US troop levels in Afghanistan, US detentions in Bagram and elsewhere in Afghanistan are likely to continue, if not increase.<sup>5</sup> The US government must ensure that all detentions, wherever they are conducted, are brought into full compliance with international law and standards.

The new administration has already been provided an opportunity to break from the approach of its predecessor to the Bagram detentions, in litigation currently pending in US federal court. In an immediate response to President Obama’s executive order on Guantánamo, Judge John Bates of the US District Court for the District of Columbia (DC) invited the new administration to tell him by 20 February 2009 whether, on the question of judicial review, it will adopt a different stance on the Bagram detentions to that taken by the Bush administration.

Since 2002, an unknown number of people – believed to be more than 2,000 – have been held in the detention facility at Bagram airbase, currently known as the Bagram Theater Internment

Facility (BTIF).<sup>6</sup> Most of the approximately 800 detainees who have been held at Guantánamo were held in Bagram and/or Kandahar airbases prior to being transferred to the US Naval Base in Cuba. Some were held in these US facilities in Afghanistan for many months. Today, several hundred people – the majority of them Afghan nationals, but also individuals of other nationalities – are being detained in US military custody there. **They are held without charge or trial,**

**or access to the courts or lawyers. Some have been held for years.** Some were taken into custody inside Afghanistan, some outside – the four habeas corpus petitions currently pending before Judge Bates involve nationals of Yemen, Tunisia, and Afghanistan reportedly taken into custody in Pakistan, Thailand, and United Arab Emirates and in Afghanistan.<sup>7</sup> For some detainees, their transfer to and detention in Afghanistan was the first time they had been in that country.<sup>8</sup> While the detainee population at Guantánamo has dropped from its peak of around 680 detainees in 2003 to approximately 245 today, in early 2009 there were more than 600 detainees in the Bagram facility, more than double the number of people who were being held there in 2004.

As at Guantánamo, in the absence of judicial oversight, the detentions in Bagram have been marked by the torture or other ill-treatment of detainees, particularly in the early years. If anything, detainees at Bagram suffered more deprivations and had less legal protection than those at Guantánamo. As in the case of Guantánamo, accountability for such abuses has been minimal. As at Guantánamo, the detainees at Bagram have included children, denied their right under international law to special treatment according to their age.<sup>9</sup> As at Guantánamo, detainees have been subject to transfers into and out of the base without judicial or other independent oversight or notification of family members.

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As at Guantánamo, the Central Intelligence Agency (CIA) is believed to have conducted secret detentions and interrogations at Bagram, and both facilities have served as hubs for the program of unlawful ‘renditions’ operated largely by the CIA. At least two of the cases currently before Judge Bates concern individuals who are alleged to have been subjected to enforced disappearance at unknown locations by or on behalf of the CIA before being taken to Bagram (see further below).

### **DUE PROCESS DEMANDS PROHIBITION ON CONFESSIONS FROM TORTURED SUSPECTS**

John T. Parry & Welsh S. White, *Law Professors-University of Pittsburgh, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 181

At least two lessons can be drawn from the Court’s due process confession cases. First, police interrogation practices that severely infringe on a suspect’s mental or physical autonomy violate the due process clause regardless of whether they produce statements that are admitted against the suspect. An interrogator’s torture of a suspect would thus ordinarily result in a violation of the suspect’s constitutional rights—an issue we discuss again in the next section. Second, law enforcement officers’ right to employ extreme interrogation practices apparently does not vary depending on law enforcement’s need for information. Rather, interrogation practices that are prohibited because they impose too severe infringements on individual autonomy will be impermissible regardless of the law enforcement interest at stake.

### **DUE PROCESS PROHIBITS TORTURING SUSPECTS WHETHER OR NOT IT THE INFORMATION WILL BE USED IN TRIAL**

John T. Parry & Welsh S. White, *Law Professors-University of Pittsburgh, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 181-2

As we suggested in the previous section, the legal consequences of a coercive interrogation go beyond an inadmissible confession. The use of coercion in interrogation violates the victim’s due process rights whether or not the government ever seeks to use the confession. Thus, the victims of coercive interrogation—whether or not it rises to the level of torture—may bring a Bivens or §1983 action for damages against their interrogators.

### **HABEAS CORPUS IS NECESSARY TO SOLVE TORTURE AT BAGRAM**

AMNESTY INTERNATIONAL, 18 FEBRUARY 2009 [“USA: OUT OF SIGHT, OUT OF MIND, OUT OF COURT? THE RIGHT OF BAGRAM DETAINEES TO JUDICIAL REVIEW,”

[HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/AMR51/021/ 2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML](http://www.amnesty.org/en/library/asset/AMR51/021/2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML)]

As a practical matter, no effective judicial review of the lawfulness of Bagram detentions is currently available in Afghanistan. The US military’s complete control over the Bagram detainees and legal agreements between the two governments effectively keeps them out of the control of the Afghan government. Furthermore, Afghanistan’s judicial system continues to fall far short of international standards.<sup>81</sup> This practical reality in no way exempts the USA from ensuring the rights of the detainees to judicial review is fully realized – indeed, it accentuates the USA’s obligation. In the absence of alternatives, if access to judicial review in the US courts is the only route by which the USA can ensure compliance with its obligations under international law, it must ensure that such review in the US courts is granted. While it is generally preferable that the court conducting judicial review be located close to the place of detention, as physical access of the court to the detainee is an important element in such review, as with the Guantánamo detention facility, the preference for physical proximity cannot be used as a basis for depriving any detainee of effective judicial review altogether.

The denial of judicial review for detainees designated by the USA as “enemy combatants” in the so-called “war on terror” has been an integral part of an unlawful US detention regime operated over the past seven years. Treating detainees as perceived security threats and “intelligence assets” from whom information could be coerced rather than as human beings to whom legal process was due led not only to arbitrary detention, but also to detention conditions and interrogation techniques that violated international law, including the prohibition on torture or other cruel, inhuman or degrading treatment, secret detention and enforced disappearance, as well as the formulation of administrative review and trial procedures geared to admit information obtained under torture or other ill-treatment.

Effective judicial review of executive detentions, coupled with fundamental reform of the legislative and policy framework under which such detentions have operated, would offer protection against such human rights violations, and a route to remedy for detainees, and should be

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fully guaranteed by the new administration and Congress as part of bringing the USA's policies and practices into line with international law and standards.

The history of detentions at Bagram – as well as the history of US detentions in Guantánamo and elsewhere in what the Bush administration called the “war on terror” – serves to highlight the need for full and effective judicial review.

## **Military Tribunals Allow Confessions Through Torture**

### **MILITARY TRIBUNALS ALLOW CONFESSIONS OBTAINED THROUGH TORTURE**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 132

Some detainees will be tried before military commissions, rather than in conventional criminal courts. Proceedings before military commissions provide fewer formal rights than do trials. The Military Commissions Act of 2006 (“MCA”) provides “vastly more limited protections than do either ordinary criminal trials or traditional military courts martial.” While purporting to ban “torture,” again, United States agents could plausibly argue that they understood waterboarding *not to constitute torture*. The MCA includes a “good-faith defense” that applies retroactively to cover the period between September 11, 2001, and the passage of the Detainee Treatment Act of 2005 (“DTA”). Moreover, statements can be introduced in military commission proceedings when the amount of “coercion” used is the subject of dispute.

## **Legitimization of Torture Offends Basic Concept of Justice**

### **PROHIBITION AGAINST TORTURE VITAL TO LEGITIMATE SYSTEM OF JUSTICE**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 171-2

The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and the force with which law rules. The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts....People may fear and be deterred by legal sanctions; they may dread lawsuits; they may even on occasion be forced to legal means or legally empowered officials to do things or go places against their will. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated. Instead, there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. I think the rule against torture functions as an archetype of this very general policy. It is vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of breaking a person's will.

### **USE OF TORTURED CONFESSIONS AT TRIALS OFFENDS BASIC CONCEPTS OF DUE PROCESS AND JUSTICE**

M. Katherine B. Darmer, *Law Professor, Chapman University, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 133-4

The lesson of *Brown* is that courts should act as gatekeepers to forbid the use of tortured confessions in court. Even beyond conventional criminal courts, any system designed to adjudicate guilt or innocence with integrity cannot rely on tortured confessions. Our own Supreme Court recognized that due process is offended by torture almost seventy-five years ago. And the due process violation it identified was not just the torture inflicted by law enforcement, but the systematic offense to due process wrought by the reliance on torture at the "pretense" of a trial.

After 2001, we are in danger of failing the lessons of *Brown*. A more robust interpretation of due process, with a focus on both reliability of confessions and the integrity of judicial and quasi-judicial proceedings is truer to our history and values than the notion that exclusion serves no goal other than deterrence and that reliability serves no part of the Constitution.

### **ANY WEAKENING OF THE BAN ON TORTURE UNDERMINES ENTIRE LEGAL SYSTEM**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 150

On this basis, the article concludes not only that the absolute prohibition on torture should remain in force, but also that any attempt to loosen it (either explicitly or by narrowing the definition of "torture") would deal a traumatic blow to our legal system and affect our ability to sustain the law's commitment to human dignity and nonbrutality even in areas where torture as such is not involved.

### **TREATING TORTURED CONFESSIONS OF TERROR SUSPECTS DIFFERENTLY CORRUPTS THE ENTIRE JUDICIAL SYSTEM**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 173

The damage done to our system of law by undermining the prohibition on torture is, I think, just like this. If we were to permit the torture of al Qaeda and Taliban detainees, or if we were to define what most of us regard as torture as not really "torture" at all to enable our officials to inflict pain on them during questioning, or if we were to set up a Dershowitz regime of judicial torture warrants, maybe only a few score detainees would be affected in the first instance. But the character of our legal system would be corrupted. We would be moving from a situation in which our law had a certain character—a general virtue of nonbrutality—to a situation in which that character would be compromised or corrupted by the permitting of this most brutal of practices. We would have given up the linchpin of the modern doctrine that law will not operate savagely

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or countenance brutality. We would no longer be able to state that doctrine in any categorical form. Instead we would have to say, more cautiously and with greater reservation: “In most cases the law will not permit or countenance brutality, but since torture is now permitted in a (hopefully) small and carefully cabined class of cases, we cannot rule out the possibility that in other cases the use of brutal tactics will also be permitted to agents of the law.” In other words, the repudiation of brutality would become a technical matter—“Sometimes it is repudiated, sometimes not” – rather than a shining issue of principle.

#### **ALLOWING EXCEPTIONS FOR TORTURE WITH TERRORISM SUSPECTS CORRUPTS NON-BRUTALITY NORM THROUGHOUT JUSTICE SYSTEM**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 173-4

As we have seen, the prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: We do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty. And the same is true of procedural due process constraints, certain liberty-based constraints of substantive due process, and our general repudiation of brutality in law enforcement. So, in order to see what might go wrong as a result of undermining the prohibition on torture, we have to imagine Eighth Amendment jurisprudence without this point of reference—arguing about cruelty without the assumption that torture, at any rate, is wholly out of the question. Or we have to imagine Fifth Amendment jurisprudence without this point of reference, where arguments about coerced confessions and self-incrimination must be made against the background of an assumption that torture is sometimes legally permissible. The halting and hesitant character of such argumentation would itself be a blight on our law, in addition to the actual abuses that would result. Or rather, the two would be separated: Because law is an argumentative practice, the empirical consequences for our law would be bound up with the corruption of our ability to make arguments of a certain kind, or to assert principles which put torture unequivocally beyond the pale and used that to provide a vivid and convincing basis for the elaboration of a general principle of nonbrutality.

#### **RELAXING THE PROHIBITION ON TORTURE FOR TERROR SUSPECTS UNDERMINES JUDICIAL SYSTEM**

John T. Parry & Welsh S. White, *Law Professors-University of Pittsburgh, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 182-3

The relevance of these statements and the case law should not be overestimated, however. US law on torture has developed in situations in which the individual interests at stake are to be weighed against law enforcement’s general interest in solving or punishing a crime; it has not been tested against the more extreme circumstances presented by terrorism.

When government officials are seeking information from a suspected terrorist, they may be seeking to protect national security or even to prevent the imminent loss of life. When interests of this magnitude are involved, arguably the balance struck in cases like chambers – where the government’s only interest is in solving a completed crime—should be recalibrated. Nevertheless, the evolution of the Court’s due process confession cases, as well as other discussions of torture, provide a clear warning that allowing police interrogators to employ torture in any situation would be contrary to safeguards that have become a part of our constitutional heritage.

## **Torture Debases Society**

### **TORTURE SPREADS, DEBASES WHOLE SOCIETY**

**Amnesty International**, October 27, 2004 [“Human dignity denied: Torture and accountability in the ‘war on terror’,” AMR 51/145/2004, [www.amnesty.org](http://www.amnesty.org), p. 191]

Thirty years ago, Amnesty International wrote, and writes again now:

*“Cancer is an apt metaphor for torture and its spread through the social organism. The act of torture cannot be separated from the rest of society; it has its consequences, it degrades those who use it, those who benefit from it, and it is the most flagrant contradiction of justice, the very ideal on which the state wishes to base its authority... Just as states that say to give in to terrorism is to invite the loss of many more lives, so to give in to the use of torture is to invite its spread and the eventual debasement of the whole society. Torture is never justified. The absolute prohibition on torture is the only acceptable policy. The system that uses it only mocks any noble ends it might profess... Torture is the ultimate human corruption.”*<sup>770</sup>

In his November 2003 speech on the Guantánamo detentions cited at the beginning of this report, senior UK judge Lord Steyn advised that “in order to understand and to hold governments to account we do well to take into account the circles of history”.<sup>771</sup>

By learning the lessons of history we make it less likely that we will repeat our mistakes. To authorize, commit or turn a blind eye to torture or cruel, inhuman or degrading treatment is always a mistake.

### **TORTURE DEGRADES ENTIRE SOCIETY**

**Hunsinger, McCord professor of theology at Princeton Theological Seminary**, January 31, 2005

[George, “American scar; Permitting torture brands us in the worst way,” The Baltimore Sun, 1/n]

For religious people, torture is especially deplorable because it sins against God and against humanity created in God's image.

**It degrades everyone involved - planners, perpetrators and victims.**

More than 225 Christian, Jewish, Muslim and Sikh religious leaders signed an open letter to Mr. Gonzales. They objected to his role in developing a narrow definition of torture and to his equally troubling assertion that some people are not subject to the protections of international law. They registered deep concern about our government's moral foundations, urging support - in practice, not just in words - for fundamental human rights.

### **TORTURE CAUSES SPIRITUAL DEATH OF ALL SOCIETY**

**Hunsinger, McCord professor of theology at Princeton Theological Seminary**, January 31, 2005

[George, “American scar; Permitting torture brands us in the worst way,” The Baltimore Sun, 1/n]

Nothing less is at stake in the torture crisis than the soul of our nation. What does it profit us if we proclaim high moral values but fail to reject torture? What does it signify if torture is condemned in word but allowed in deed? A nation that rewards those who permitted and promoted torture is approaching spiritual death.



## **Torture is Biopower**

**THIS REGIME OF TORTURE IS THE MOST EXTREME EXAMPLE OF BIOPOLITICS—IT REPRESENTS THE MOST RADICAL CLAIM OF THE SOVEREIGN TO CONTROL THE BODIES OF THOSE WHO THREATEN THE POPULATION AS A WHOLE**

**HARDT & NEGRI**, PROFESSOR OF LITERATURE DUKE UNIVERSITY/PROFESSOR OF PHILOSOPHY AND POLITICS EUROPEAN GRADUATE SCHOOL, AND PROFESSOR AT THE UNIVERSITY OF FRANCE, **2009**  
[MICHAEL AND ANTONIO, *MULTITUDE*, PP. 19]

Biopower wields not just the power of the mass destruction of life (such as that threatened by nuclear weapons) but also individualized violence. **When individualized in its extreme form, biopower becomes torture.** Such an individualized exercise of power is a central element in the society of control of George Orwell's 1984. "How does one man assert his power over another, Winston? Winston thought. 'By making him suffer,' he said. 'Exactly. By making him suffer. Obedience is not enough.' "30 Torture is today becoming an ever more generalized technique of control, and at the same time it is becoming increasingly banalized. Methods for obtaining confessions and information through physical and psychological torments, techniques to disorient prisoners (such as sleep deprivation), and simple means of humiliation (such as strip searches) are all common weapons in the contemporary arsenal of torture. Torture is one central point of contact between police action and war; the torture techniques used in the name of police prevention take on all the characteristics of military action. This is another face of the state of exception and the tendency for political power to free itself from the rule of law. In fact, there are increasing numbers of cases in which the international conventions against torture and the domestic laws against cruel and unusual punishment have little effect.3' Both dictatorships and liberal democracies use torture, the one by vocation and the other by so-called necessity. According to the logic of the state of exception, torture is an essential, unavoidable, and justifiable technique of power.

Sovereign political power can never really arrive at the pure production of death because it cannot afford to eliminate the life of its subjects. Weapons of mass destruction must remain a threat or be used in very limited cases, and torture cannot be taken to the point of death, at least not in a generalized way. Sovereign power lives only by preserving the life of its subjects, at the very least their capacities of production and consumption. If any sovereign power were to destroy that, it would necessarily destroy itself. More important than the negative technologies of annihilation and torture, then, is the constructive character of biopower. **Global war must not only bring death but also produce and regulate life.**

**AND, TORTURE IS THE CRUCIAL INTERNAL LINK BETWEEN THE SLIDE FROM A BENIGN BIOPOLITICS OF LIFE TO NECROPOLITICAL EXTERMINATION OF DANGEROUS POPULATIONS—TORTURE IS WHERE BIOPOLITICS DRAWS THE LINE BETWEEN WHO MUST BE MADE TO LIVE AND WHO CAN BE LEFT TO DIE**  
**MORTON**, SENIOR LECTURER IN ANGLOPHONE LITERATURES, UNIVERSITY OF SOUTHAMPTON, **2008**  
[STEPHEN, "TORTURE, TERRORISM AND COLONIAL SOVEREIGNTY," *FOUCAULT IN AN AGE OF TERROR: ESSAYS ON BIOPOLITICS AND THE DEFENCE OF SOCIETY*, EDS. STEPHEN MORTON AND STEPHEN BYGRAVE, P. 192-194]

It is precisely this understanding of the political that Foucault articulates in his definition of racism as a 'way of introducing a break between the domain of life that is under power's control: the break between what must live and what must die' (SMBD, 254). **What this distinction between the biopolitical and the necropolitical implies is that it is a sovereign who defines the break between these categories:** not a monarch, but a colonial sovereign such as an administrator, judge, policeman or soldier. Indeed, Foucault's observation that 'Racism first develops with colonization, or . . . colonizing genocide' (SMBD, 257) assumes the presence of sovereign power that presides over colonisation and genocide. Yet to represent the exercise of sovereign power that Foucault describes is perhaps to make a spectacle of suffering and to become complicit with state terrorism. As the South African writer J. M. Coetzee argues in 'Into the Dark Chamber', 'there is something tawdry about following the state in this way, making its vile mysteries the occasion of fantasy'.20 Against this relationship of complicity, Coetzee asserts that **the challenge facing the writer concerned with torture is 'not to play the game by the rules of the state . . . to establish one's own authority . . . and to imagine torture and death on one's own terms'.**21 Of the South African novels that Coetzee claims have aestheticised torture and violence, Alex La Guma's *In the Fog of the Season's End* is singled out for its 'dark lyricism':22 'It is as though, in avoiding the trap of ascribing an evil grandeur to the police, La Guma finds it necessary to displace that grandeur, in an equivalent but negative form, onto their surroundings, lending to the very flatness of their world hints of a metaphysical depth'.23

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Coetzee's critique of La Guma is illuminating in its ethical caution against the aestheticisation of violence, but it overlooks the way in which La Guma reveals the violent foundation of the colonial state in order to promote resistance to the apartheid regime in South Africa. In the prologue, for instance, La Guma reveals the violence of the colonial state through the detectives' clipped address to the prisoner as they drive to the city limits: "No more lawyers. Those times are past . . . We even keep the magistrates away now" . . . "We'll make you shit," the driver said viciously'.<sup>24</sup> In this minimal dialogue, La Guma not only registers the suspension of civil law and the threat of physical violence, but also the sovereign power of the police over the bodily life and functions of the colonised. In so doing, La Guma stresses how the political foundation of the South African state under apartheid is based on terror rather than democracy and the rule of law. As the prisoner asserts, "You are going to torture me, maybe kill me. But that is the only way you and your people can rule us. You shoot and kill and torture because you cannot rule in any other way a people who reject you."<sup>25</sup> In this speech, the prisoner, who is later revealed to be Elias, demystifies the violent foundations of the colonial state.

Yet this is not to suggest that In the Fog of the Season's End is merely concerned with the sovereign power of the torturer and the pain and suffering of the tortured prisoner. For the majority of the novel details the organisation of resistance to the apartheid state, and the scenes of torture also work to promote disaffection with the colonial regime. As Abdul JanMohamed puts it in *Manichean Aesthetics*, 'in this novel the self-as-an-individual discovers his being in his existence for others, in his existence as a social being'.<sup>26</sup> For JanMohamed, Elias not only achieves consciousness of 'the social conditions in South Africa, but also of the only way out of those oppressive circumstances'.<sup>27</sup> Indeed, it is Elias's resistance to the will of his torturers at the end of the novel that signals his commitment to his comrades and to the struggle against the regime. In this sense, Elias gains sovereignty over his life (and death) by refusing to cooperate with the security forces. In doing so, Elias not only refuses the sovereign power of the torturer, but also the colonial system that the torturer represents.

To be sure, in making torture visible to a reading public, writers such as Ngugi and La Guma would seem to challenge the apparent 'disappearance of torture as a public spectacle' that Foucault diagnoses in *Discipline and Punish*.<sup>28</sup> Yet this challenge does not simply make a spectacle out of suffering (as Coetzee suggests). If, as Foucault argues in *Discipline and Punish*, physical pain and inflicting pain on the body of the condemned is 'no longer the constituent element of the penalty' in various European legal systems,<sup>29</sup> both Ngugi and La Guma foreground the persistence of sovereign forms of violence and resistance to that violence in the context of the European colony, even though the colonial state attempts to conceal that violence from public knowledge.

It is perhaps a little surprising that Foucault, writing in the 1970s in *Discipline and Punish*, makes no reference to the debate about the use of torture in French-occupied Algeria between Sartre, Fanon and de Beauvoir that became a part of public discourse on the French Left in the 1950s and early 1960s; to the use of indefinite detention and torture in British-occupied Kenya during the 1950s; or to the routine use of state torture in South Africa in the aftermath of the pass laws and the Sharpeville massacre.

Yet, if we re-read Foucault's analysis of torture in Discipline and Punish in light of what he subsequently says about racism in Society Must Be Defended – as that which introduces 'a break between the domain of life that is under power's control: the break between what must live and what must die' (SMBD, 254) – it becomes possible to find exceptions to the historical break between sovereign power and disciplinary power that Foucault posits in Discipline and Punish. Such exceptions not only complicate the charge that Foucault's analytic of power overlooks the persistence of sovereign power in the European colony, but also demonstrates the way in which Foucault's account of a race war helps to make sense of contemporary formations of biopolitical and necropolitical control.

### ULTIMATELY, THIS SLIDE INTO THE DARK SIDE OF BIOPOLITICS MAKES POSSIBLE THE WORST FORMS OF GLOBAL VIOLENCE—TOTAL WARFARE, GENOCIDE, AND NUCLEAR ANNIHILATION

MARKS, ASSOCIATE PROFESSOR IN FRENCH, UNIVERSITY OF NOTTINGHAM, 2008 [JOHN, "MICHEL FOUCAULT: BIOPOLITICS AND BIOLOGY," *FOUCAULT IN AN AGE OF TERROR: ESSAYS ON BIOPOLITICS AND THE DEFENCE OF SOCIETY*, EDS. STEPHEN MORTON AND STEPHEN BYGRAVE, P. 97-98]

Although biopower in this sense has a relatively benign focus, it is undeniable that wars have become increasingly bloody and costly in terms of human life. In the nineteenth century the idea develops that war is a way of making one's own 'race' stronger. The changes in the nature of warfare culminate in the phenomenon of so-called 'total war' in the first half of the twentieth century and the threat of global nuclear annihilation in the second half. Also, states become willing to carry out genocide on groups within their own population. As far as Foucault is concerned, this new right of death is simply the reverse side of the drive to foster and protect the life of the population. All wars become race wars, in that population is ranged against population. Also, war frequently becomes a question of racial survival. In short, there is a genocidal tendency that is inescapable in the exercise of modern power (SMBD, 257-8). The 'racist' logic of contemporary warfare depends on biological dimensions, and this logic is expressed most clearly in the rationale of Nazism. The Nazi state is faced with both internal and external 'enemies', and to a large degree it is not sufficient simply to defeat them; they must be exterminated in order to make the life of the Aryan race healthier and purer. What is more, as far as internal enemies are concerned, it is not only the weak, 'degenerate' fraction of the population that constitutes an internal danger, but potentially the entire population. In Nazi Germany this leads to the 'Final Solution', the plan to exterminate the Jewish 'race' and all other internal enemies of the Nazi state, and to the attempt to bring about the 'suicide' of the entire German population.

## **Torture is Bare Life**

### **THE PRISONER AT BAGRAM AIR BASE IS THE HOMO SACER.**

**DABASHI**, PROFESSOR OF IRANIAN STUDIES AND COMPARATIVE LITERATURE AT COLUMBIA UNIVERSITY, 2008 [HAMID, *ISLAMIC LIBERATION THEOLOGY*, PP. 260-1]

Agamben sees and argues his point through the internal dynamics of the “Western politics”: “At once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested.”<sup>13</sup> **The face of that enemy**, however, **today looks peculiarly Muslim**. He is an Afghan “enemy combatant” that does not and will not, following Agamben’s argument, receive the status of POW (prisoner of war). He is (not) a POW, for if he were to be a POW, then he would not be an exception. So he is the exception that makes the rule of “Western politics” possible. But (and here is the frightful insight of Agamben) the Afghan “enemy combatant” or the Iraqi “insurgent” is also the exception that is eating into the rule, that becomes the rule, just like a cancerous cell eating into a healthy body (Agamben’s otherwise “Western politics”). But, and there is Agamben’s bone of contention, **the presumed health of that (“Western”) body was always contingent on the public secret of the fact of that exception.** There was always an Afghan “enemy combatant” at the heart of “Western politics.” if we were to follow Agamben’s argument. But he was a Jew in a concentration camp in one reading of it and now a Muslim in Abu Ghraib in another.

**The Afghan “enemy combatant” in Bagram Air Base** or the Iraqi “inmates” in Abu Ghraib **torture chambers** **is** the figure and phenomenon of Agamben’s **homo sacer**. He cannot be sacrificed because he is outside the fold of humanity, and he can be killed without any legal recourse because he is outside the domain of law. Embedded in the modern democratic state is this inherent contradiction, the active politicization of zoe”, down and out against the assumption of bios. There is no more bios, no political person with inherent rights to citizenship. **Zoe”, the animal life embedded in the political formalism of bios, today has a manifest body, the living dead, the dead man walking, just like the figure of “musulman” (Muslim) in Nazi concentration camps. But that figurative “musulman” has now become the real Muslim, the Muslim, the Muslims incarcerated in Bagram Air Base, in Guantanamo Bay, in the Abu Ghraib torture chambers. In a frightful way, the figure of “the enemy combatant” in Bagram Air Base, Guantanamo Bay, or Abu Ghraib is figurative, the symbol of itself, the sign of its own foreclosure,** and thus the signature at the concluding moment of Agamben’s “Western politics.” But, and there is the rub, the point of Agamben’s insights, Lynndie England has brought back the virus of the terrorist with herself back to America, back to “the West,” back to “Western politics.” When he dismissed Muslim “enemy combatants” from inclusion in the articles of the Geneva Convention, the US Attorney General Alberto R. Gonzales may have thought he was doing Americans a favor. He was not. He was writing the death sentence of every single citizen of every single “liberal democracy” in “Western politics. If what Agamben has discovered is true, and is frightfully true, then with Lynndie England all Americans, **all “Westerners,” have become terrorists in and of themselves – for zoe” is the implosion of bios, the melt down of its formal claim to citizenship.** This insight, Agamben traces as far back as when Alexis de Tocqueville wrote on democracy in America, back to when zoe” began to take over bios – and by taking it back to the origin of the Roman Law, Agamben is having a much larger claim on the longevity and endurance of homo sacer, the public secret of “Western politics.”

Agamben’s frightful proposition is at once uncanny and liberating: “The idea of **an inner solidarity between democracy and totalitarianism** (which we must, with every caution, advance) . . . **must nevertheless be strongly maintained on a historico-philosophical level, since it will allow us to orient ourselves in relation to the new realities and unforeseen convergences of the end of the millennium.**”<sup>14</sup> **The world at large, however, as always at the receiving end of Euro-American democracies going on their colonial conquests, did not have to wait for “the new realities** and unforeseen convergences of the end of millennium.” These may indeed be new realities to Agamben and from his vantage point in “the Western politics.” They certainly are not from any place in Asia, Africa, or Latin America, where no one was ever granted the status of a bios and taken ipso facto for the zoe”. Beginning with Aristotle himself and his racial theories, down to Immanuel Kant and his unsurpassed racism, and down to the status of “the enemy combatant” give to Afghans, Iraqis, and other Muslims, zoe” was the order of the day. When Alan Dershowitz theorizes legalized torture of Muslims from the heart of “Western” jurisprudence (recommended to Americans on the Israeli model), or when the US attorney General Alberto R. Gonzales categorically places (Muslim) “enemy combatants” outside the realm of law, or when Michael Ignatieff theorizes torturing of (Muslim) people from the heart of the human rights discourse, they are all doing so in the grand “Western” tradition that Agamben has now laid bare.

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We, and this “we” speaks that language of the world at large that is outside the domain of “Western politics” have always had our lives naked; our bios degenerated into zoe”, entirely unbeknown to ourselves. We were theorized/terrorized unbeknown to ourselves. We were/are “the state of exception” that has made the rule of “Western politics” possible. We are the bare life, our lives the zoe” of their polis.

**US TORTURE POLICY IS A CONTEMPORARY EXAMPLE OF THE STATE OF EXCEPTION: AS INDIVIDUALS IN THE CAMPS ARE STRIPPED TO HOMO SACER THESE CAMPS BECOME THE FUNDAMENTAL BIOPOLITICAL PARADIGM OF THE WEST.**

**ROGERS, 2008**, LECTURER IN LAW AT THE SCHOOL OF LAW AND JUSTICE AT SOUTHERN CROSS UNIVERSITY, LISMORE [NICOLE, “TERRORIST V SOVEREIGN: LEGAL PERFORMANCES IN A STATE OF EXCEPTION”, ACCESSED VIA LEXIS, [CL]]

According to Agamben, the distinguishing feature of the state of exception is that, within this realm, law merges with life.

**The state of exception is exemplified by the concentration camps of Nazi Germany** (Agamben 1998: 20); **Guantanamo Bay is a contemporary example**. The critical point made by Agamben is that, far from being the exception, the state of exception has 'reached its maximum worldwide deployment' (2005: 87). In the modern configuration of the state of exception, individual liberties are no longer protected by constitutional guarantees or constitutional norms, and the executive's powers are significantly enhanced such that its decrees have the force of [\*162] law (Agamben 2005: 5). The distinction between legislative, executive and judicial powers becomes blurred or disappears (Agamben 2005: 7). As the state of exception acquires an increasingly universal political relevance, 'bare life' has become a central part of the political order (Agamben 1998: 9), and the camp has become 'the fundamental biopolitical paradigm of the West' (Agamben 1998: 181). Agamben draws upon or arguably completes Foucault's work on biopolitics (1998: 9), which encompasses the 'growing inclusion of man's natural life in the mechanisms and calculations of power' (1998: 119).

In doing so, he contemplates the role and nature of his 'protagonist', homo sacer or bare life (1998: 8). Homo sacer, originally an 'obscure figure of ancient Roman law' (Agamben 1998: 8), is the scapegoat without legal status; excluded from the 'city of men'; abandoned by the law; 'exposed and threatened on the threshold' between life and law (1998: 28) like an unwanted foundling. This vulnerable figure can be killed with impunity, and the violence of his killing falls outside 'the sanctioned forms of both human and divine law' (1998: 82). Significantly, Agamben places homo sacer outside 'the mediations of the law' (Fitzpatrick 2001: 258) but, as Fitzpatrick points out, at least two of the Roman authors on which Agamben relies argued that homo sacer could be incorporated within the legal order and judged, possibly by way of trial (2001: 256-7).

Agamben asserts that 'we are all virtually homines sacri' (1998: 115), but it is easier to discern the characteristics of homo sacer in a more discrete group: the individuals accused of terrorist offences or suspected of involvement in terrorism-related activities. These individuals, stripped of basic rights, surveilled by the state, subjected to house arrest or even more extreme forms of violent detention by the state, can be readily identified as the contemporary incarnation of homo sacer. However, since such individuals are able to mount legal challenges against these forms of surveillance and control by the state, they do not share the central defining characteristic of homo sacer: that of being outside the law.

[\*163] Agamben distinguishes his approach from that of Foucault in that he focuses on the connection between biopolitics and sovereignty, or the 'hidden point of intersection between the juridico-institutional and the biopolitical models of power' (Agamben 1998: 6). He acknowledges an unlikely symmetry and relationship between homo sacer, controlled and disciplined by the biopolitical mechanisms which characterise the contemporary political era, and the sovereign, who creates and administers such biopolitical strategies. Both homo sacer and the sovereign are, for different reasons, outside the law, and thus they represent 'the two poles of the sovereign exception' (Agamben 1998: 110). This point is made with some poignancy by Terry Hicks, the father of David Hicks who, for so long, in his extended incarceration in Guantanamo Bay, exemplified homo sacer; Terry has marvelled over the fact that his son's name is so frequently mentioned by President Bush (Souter 2006). Others have observed that the sovereign and the terrorist are linked in the 'war against terrorism' discourse. Anna Szorenyi and Juliet Rogers argue that 'the sovereign in contemporary legal discourse is located vis-a-vis the terrorist' and that terrorism, which is 'an injury to the body sovereign', provides meaning for the sovereign figure (2006: 11).

There is no doubt that legal contests between the accused terrorist and the sovereign are occurring with some frequency in the state of exception which arguably characterises contemporary Western societies. Their very occurrence could be perceived as an anomaly given the theoretical parameters of the state of exception as a lawless void. However, Agamben describes a relationship of mutual dependency in which the judicial order 'must seek in every way to assure itself a relation' with this 'space devoid of law' (2005:51). In any event, some of these 'legal' performances, for instance those staged by the Bush administration in processing the Guantanamo Bay detainees, are quasi-legal proceedings and not necessarily representative of the rule of law. Fleur Johns rejects this

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conclusion and contends that the regime at Guantanamo Bay is, in fact, 'a profoundly anti-exceptional legal artefact' (2005: 615) with no space for option, doubt and responsibility in the legal procedures which apply therein. This [164] description, however, suggests bureaucracy rather than law -- the sort of murderous bureaucracy which engendered mass genocide during the Third Reich: the 'governmental violence that -- while ignoring international law externally and producing a permanent state of exception internally -- nevertheless still claims to be applying the law' (Agamben 2005: 87).

**TORTURE RIDS OF THE ABILITY TO ACT WITHIN HUMANS, REDUCING INDIVIDUAL BEINGS TO MERE LIFE TO BE USED AT WILL**

**BRECHER, 2007**, SENIOR LECTURER OF APPLIED PHILOSOPHY IN THE HUMANITIES DEPARTMENT AT BRIGHTON POLYTECHNIC, AUTHOR OF ARTICLES ON ETHICS AND SOCIAL PHILOSOPHY WHICH HAVE BEEN PUBLISHED IN THE JOURNAL OF MEDICAL ETHICS (BOB, *TORTURE AND THE TICKING BOMB*, PP.77-79)

The subject of judicial or interrogational torture is "broken" when, and only when, he has become so distraught, so unable to bear any more suffering, that he can no longer resist any request the torturer might make. The tortured then "pours out his guts". [4] The tortured person's capacity to act is broken. And since it is our capacity to act which makes us persons, rather than just instances of a particular biological species – however heavily circumscribed that capacity might be under certain

circumstances – the tortured subject is no longer a person. [5] Jean Améry, speaking as a person who in one sense survived torture, makes the point better than I ever could:

Only in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else besides that. [6]

I want to think more about what Améry says. Let me start with a very obvious question. Why is it that none of the advocates of interro- gational torture or of its legalization that I have come across make any reference at all to Améry's testimony? His essay, 'Torture', is, after all, the single best-known work of its sort. You might think that anyone discussing torture would need to say something about what it actually is. In fairness, Dershowitz at least attempts to say something about the torture he has in mind – needles under the fingernails. Like direct advocates of interrogational torture, however, he is either unable or unwilling to face up to what torture actually is in his insouciant descrip- tion of what he has in mind. I wonder why? Might it be that it makes a nonsense of any notion of torture as something 'designed to cause excruciating pain without leaving any lasting damage'? [7] Listen again to Améry.

He tells us that 'What was inflicted on me in the unspeakable vault in Breendonk was by far not the worst form of torture'. [8] I shall return to the question of "degrees" of torture presently. While not 'the worst', this is what the Nazis did to Améry:

In the bunker there hung from the vaulted ceiling a chain that above ran into a roll. At its bottom end it bore a heavy, broadly curved iron hook. I was led to the instrument. The hook gripped into the shackle that held my hands together behind my back. Then I was raised with the chain until I hung about a meter over the floor. In such a position, or rather, when hanging this way, with your hands behind your back, for a short time you can hold at a half-oblique through muscular force. . . . But this cannot last long, even with people who have a strong physical constitution. As for me, I had to give up rather quickly. And now there was a crackling and splintering in my shoulders that my body has not forgotten until this hour. The balls sprang from their sockets. My own body weight caused luxation; I fell into a void and now hung by my dislocated arms, which had been torn high from behind and were now twisted over my head. Torture, from Latin torquere, to twist. [9]

Améry goes on to speak about what 'my body has not forgotten until this hour'. You might ask why. Améry tells us: the pain was such as to be indescribable. 'The pain was what it was. Beyond that there is nothing to say. Qualities of feeling are as incomparable as they are indescribable. They mark the limit of the capacity of language to communicate.' [10] No wonder that it cannot be forgotten: 'It was over for a while. It still is not over. Twenty-two years later I am still dangling over the ground by dislocated arms, panting, and accusing myself.' [11] It is not only because of the pain that the torture stays with him, Améry says: for even "The first blow brings home to the prisoner that he is helpless, and thus it already contains in the bud everything that is to come". [12] It is the experience of utter helplessness that is central; and it is the torturer's job to make their victim utterly helpless. Why? Because 'The expectation of help, the certainty of help, is indeed one of the fundamental experiences of human beings'. [13] Take that expectation away from someone, and they are broken; something integral to their being a person is missing. That, Améry tells us, is why 'with the first blow from a policeman's fist, against which there can be no defense and which no helping hand will ward off, a part of our life ends and it can never again be revived'. [14] That, Améry tells anyone willing to listen, is why 'Whoever has succumbed to torture can no longer feel at home in the world. The

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shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained.' [15] Thirty-three years after being released from the site of the last of his tortures, on 17 October 1978, Jean Améry committed suicide. Améry had not been at home in the world since Breendonk. For in breaking a person's body, the torturer breaks the person. Thinking about torture is in fact one way of showing how body and person are co-implied. [16] I said earlier that Améry had survived torture 'in one sense'. What I meant is that the "he" who had survived was not the same person as before; under torture, his body was no longer his own, and that experience remained. In remaining, it made him into a different person. In the course of his treatment by another as not a person, his relation to his own self, as well as to others, had been shattered; his torture was now part of the person he was, and he could not "go back to who he had been". Notice in particular the first point here, about how Améry was treated 'as not a person'. In order to achieve that, his torturers had to start, at least, by treating him in one sense as a person. Only by initially recognizing him as a person – as a being whose body is integral to their identity – could they go on to break him by breaking his body. It is the whole of the process of torture in which treating him as not a person consisted; and to describe it as such is already to make a normative claim that no person ought to be treated like that. Why not? Because, and this claim is a factual one, it breaks them, it destroys the person they are. Améry's torturers, that is to say, turned his personhood against him, and in doing so made him into someone else. That is how he survived, as someone else; others do not. It is also why he eventually killed himself.

## **Torture Destroys Meaning to Life**

### **TORTURE DEVALUES LIFE, MAKING ALL OTHER IMPACTS MEANINGLESS**

**Herbert**, Editorialist at the New York Times, February 28, 2005 [Bob, "It's Called Torture," The New York Times, 1/n]

As a nation, does the United States have a conscience? Or is anything and everything O.K. in post-9/11 America? If torture and the denial of due process are O.K., why not murder? When the government can just make people vanish -- which it can, and which it does -- where is the line that we, as a nation, dare not cross?

When I interviewed Maher Arar in Ottawa last week, it seemed clear that however thoughtful his comments, I was talking with the frightened, shaky successor of a once robust and fully functioning human being. Torture does that to a person. It's an unspeakable crime, an affront to one's humanity that can rob you of a portion of your being as surely as acid can destroy your flesh.

Mr. Arar, a Canadian citizen with a wife and two young children, had his life flipped upside down in the fall of 2002 when John Ashcroft's Justice Department, acting at least in part on bad information supplied by the Canadian government, decided it would be a good idea to abduct Mr. Arar and ship him off to Syria, an outlaw nation that the Justice Department honchos well knew was addicted to torture.

Mr. Arar was not charged with anything, and yet he was deprived not only of his liberty, but of all legal and human rights. He was handed over in shackles to the Syrian government and, to no one's surprise, promptly brutalized. A year later he emerged, and still no charges were lodged against him. His torturers said they were unable to elicit any link between Mr. Arar and terrorism. He was sent back to Canada to face the torment of a life in ruins.

Mr. Arar's is the case we know about. How many other individuals have disappeared at the hands of the Bush administration? How many have been sent, like the victims of a lynch mob, to overseas torture centers? How many people are being held in the C.I.A.'s highly secret offshore prisons? Who are they and how are they being treated? Have any been wrongly accused? If so, what recourse do they have?

President Bush spent much of last week lecturing other nations about freedom, democracy and the rule of law. It was a breathtaking display of chutzpah. He seemed to me like a judge who starves his children and then sits on the bench to hear child abuse cases. In Brussels Mr. Bush said he planned to remind Russian President Vladimir Putin that democracies are based on, among other things, "the rule of law and the respect for human rights and human dignity."

Someone should tell that to Maher Arar and his family.

Mr. Arar was the victim of an American policy that is known as extraordinary rendition. That's a euphemism. What it means is that the United States seizes individuals, presumably terror suspects, and sends them off without even a nod in the direction of due process to countries known to practice torture.

### **TORTURE ATTACKS THE ENTIRE SPHERE OF ETHICS DIRECTLY—IT REDUCES LIFE TO A FLAT BIOLOGICAL MACHINE**

**ZIZEK**, SENIOR RESEARCHER AT THE INSTITUTE OF SOCIAL STUDIES, LJUBLJANA, 2008 [SLAVOJ, *VIOLENCE*, P. 44-46]

Harris violates his own rules when he focuses on September ii, and in his critique of Chomsky. Chomsky's point is precisely that there is a hypocrisy in tolerating the abstract-anonymous killing of thousands, while condemning individual cases of the violation of human rights. Why should Kissinger, when he ordered the carpet bombing of Cambodia that led to the deaths of tens of thousands, be less of a criminal than those responsible for the Twin Towers collapse? Is it not because we are victims of an "ethical illusion"? The horror of September 11 was presented in detail in the media, but al-Jazeera TV was condemned for showing shots of the results of U.S. bombing in Fallujah and condemned for complicity with the terrorists.

There is, however, a much more disquieting prospect at work here: the proximity (of the tortured subject) which causes sympathy and makes torture unacceptable is not the victim's mere physical proximity but, at its most fundamental, the proximity of the Neighbour, with all the Judeo-Christian-Freudian weight of this term, the proximity of the thing which, no matter how far away it is physically, is always by definition "too close." What Harris is aiming at with his imagined "truth pill" is nothing less than the abolition of the dimension of the Neighbour. The tortured subject is no longer a Neighbour, but an object whose pain is neutralised, reduced to a property that has to be dealt with in a rational utilitarian calculus (so much pain is tolerable if it prevents a much greater amount of pain). What disappears here is the abyss of the infinity that pertains to a subject. It is thus significant that the book which argues for torture is also a book entitled The End of Faith—not in the obvious sense of, "You see, it is only our belief in God, the divine injunction to love your neighbour, that ultimately prevents us from torturing people!," but in a much more radical sense. Another subject (and ultimately the subject as such) is for Lacan not something directly given, but a "presupposition," something presumed, an object of belief—how

**can I ever be sure that what I see in front of me is another subject, not a flat biological machine lacking depth?**

**TORTURE REDUCES THE THE SUBJECT TO A “VEGETABLE STATE”—DESTROYS VALUE TO LIFE**

**JEFFREYS, 2009**, ASSOCIATE PROFESSOR OF HUMANISTIC STUDIES AND RELIGION AT THE UNIVERSITY OF WISCONSIN [DEREK S, *SPIRITUALITY AND THE ETHICS OF TORTURE*, PP. 55-62]

In her well-known book on torture, Elaine Scarry describes how it is “world destroying” because it can reduce someone to pain and a torturer’s desires.<sup>7</sup> Torture dissolves the unities of our world, mocking attempts to remain psychically and physically whole. It particularly targets our spiritual transcendence. The person is open to a universe and transcends his biological and cultural limitations. He also relates to ideals and unifies his experience in remarkable ways. Torture directly undermines these capacities. Rather than receiving diverse information, the tortured person is driven to focus only on pain and the information that the torturer seeks. Isolated, his range of knowing quickly becomes constricted. In his famous book, *Prisoner without a Name, Cell without a Number*, Argentinean journalist Jacobo Timerman powerfully captures the spiritual constriction of torture. Tortured under the Argentinean junta in the 1970s, he adopted what he called a “vegetable attitude,” an absolute passivity of “casting aside all logical emotions and sensations—fear, hatred, vengeance—for any emotion or sensation meant wasting useless energy.”<sup>8</sup> Timerman advises those undergoing torture to adopt this vegetable attitude because any attempt to relate to reality is useless and dangerous. Hopes, ideas, and thoughts all disintegrate in the torture chamber.

Sensory deprivation constitutes one such assault on spiritual transcendence. Many Americans do not view it as torture, but know little about modern interrogations. Torturers have long hooded prisoners, denying them access to sights and sounds. Among other places, hooding has appeared in South Africa, Brazil, Algeria, and Great Britain.<sup>9</sup> Although it is not considered full sensory deprivation, hooding powerfully disrupts our normal way of knowing. Torturers also place victims in solitary confinement, denying them access to outside stimuli. They recognize how isolation can shatter one’s personality, leaving people broken and willing to share information. As historian Alfred McCoy details, sensory deprivation took sinister turns as a CIA interrogation technique in the 1950s and the 1960s.

**TORTURE DEHUMANIZES THOSE IT IS PRACTICED ON, TREATING THEM AS LESS THAN ANIMALS**

**JEFFREYS, 2009**, ASSOCIATE PROFESSOR OF HUMANISTIC STUDIES AND RELIGION AT THE UNIVERSITY OF WISCONSIN [DEREK S, *SPIRITUALITY AND THE ETHICS OF TORTURE*, PP. 40-41]

We can understand this disintegration better by recalling our embodied nature. Unless it kills, torture cannot separate the soul from the body (which is impossible in this life). However, it can undermine a person’s unity by treating him as a nonhuman animal. For example, in late 2002, the United States began using “enhanced interrogation” techniques on prisoners at Guantánamo Bay. One prisoner who was particularly targeted was Mohammed al-Qahtani. He came to the United States intent upon participating in the September 11 attacks, but immigration officials stopped him. He was released, but later captured while fighting in Afghanistan, and was sent to Guantánamo Bay. Time magazine obtained a log of his interrogation, which describes how the [d]etainee was reminded that no one loved, cared or remembered him. He was reminded that he was less than human and that animals had more freedom and love than he does. He was taken outside to see a family of banana rats. The banana rats were moving freely, playing, eating, showing concern for one another. Detainee was compared to the family of banana rats and reinforced that they had more love, freedom, and concern than he had. Detainee began to cry during the comparison.<sup>67</sup>

In another log entry, the interrogator “told detainee that a dog is held in higher esteem because dogs know right from wrong and know to protect innocent people from bad people. Began teaching detainee lessons such as stay, come, and bark to elevate his status up to that of a dog. Detainee became very agitated.”<sup>68</sup> Interrogators aimed at breaking al-Qahtani’s will by degrading him to a subhuman status. They subjected him to more than forty-eight days of enhanced interrogation techniques aimed at rupturing his will. For interrogators, he was no longer an embodied spirit differing from other beings in the universe. Instead, he was an animal unworthy of moral respect. This case illustrates a radical form of breaking the will that few contemporary writers discuss. Responding to the Abu Ghraib scandal, some people said we treated detainees like animals. Or, they commented that we “wouldn’t even treat animals this way.” They also described the torturers as animals. These reactions suggest we are aware that torture threatens our status as frontier beings. In the maximal sense of breaking the will, a person retains a will even if he subsumes it into



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another's will. In the radical case I am describing, breaking the will deliberately seeks to disintegrate the personality and dethrone the person from her remarkable status in the universe. For example, people were deeply disturbed when they saw the photo of Private Lindsay holding the strap around the neck of an Iraqi at Abu Ghraib. She went beyond minimal and maximal senses of breaking the will to embrace a profound spiritual destruction. In the next chapter, I say more about it, but for defining torture, it suffices to emphasize that breaking the will can have minimal, maximal, and more radical senses.

## **Legal System Must Absolutely Prohibit Torture**

### **LEGAL SYSTEM SHOULD ABSOLUTELY PROHIBIT TORTURE**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 169

Considerations like these might furnish a pragmatic case for upholding the rule against torture as a legal absolute, even if we cannot make a case in purely philosophical terms for a moral absolute. However, I do not want to stop there. Though I think the pragmatic case for a legal absolute is exactly right, in the rest of this article I want to explore an additional idea. This is the idea that certain things might just be repugnant to the spirit of our law, and that torture may be one of them. Specifically, I want to make and explore the claim that the rule against torture plays an important emblematic role so far as the spirit of our law is concerned.

### **ABSOLUTE FIDELITY TO BAN ON TORTURE VITAL TO MAINTAIN OTHER CRITICAL ASPECTS OF THE JUDICIAL SYSTEM**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 172

The archetype idea is the reverse of a slippery slope argument. It is sometimes argued that if we relax some lesser constitutional inhibition, we will be on the downward slide towards an abomination like torture. But I am arguing in the other direction: Starting at the bottom of the so-called slippery slope, I am arguing that if we mess with the prohibition on torture, we may find it harder to defend some arguably less important requirements that--in the conventional mode of argument--are perched above torture on the slippery slope. The idea is that our confidence that what lies at the bottom of the slope (torture) is wrong informs and supports our confidence that the lesser evils that lie above torture are wrong too. Our beliefs – that flogging in prisons is wrong, that coerced confessions are wrong, that pumping person's stomach for narcotics evidence is wrong, that police brutality is wrong—may each be uncertain and a little shaky, but the confidence we have in them depends partly on analogies we have constructed between them and torture or on a sense that what is wrong with torture gives us some insight into what is wrong with these other evils. If we undermine the sense that torture is absolutely out of the question, then we lose a crucial point of reference for sustaining these other less confident beliefs.

### **ABSOLUTE BAN ON TORTURE KEY FOR JUDICIAL SYSTEM TO RENOUNCE SAVAGERY AND BRUTALITY**

Jeremy Waldron, *Law Professor-NYU School of Law, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 175

I have found this second-tier thinking about archetypes helpful in my general thinking about law. I have found it helpful as a way of thinking about what is for law to structure itself and present itself in a certain light. I have found it helpful to think about archetypes as a general topic in legal positivism, and as an interesting elaboration of Dworkin's jurisprudence. Most of all, I have found this exploration helpful in understanding what the prohibition on torture symbolizes. By thinking about the prohibition as an archetype, I have been able to reach a clearer and more substantive sense of what we aspire to in our jurisprudence: a body of law and a rule of law that renounces savagery and a state that pursues its purposes (even its most urgent purposes) and secures its citizens (even its most endangered citizens) honorably and without recourse to brutality and terror.

### **REJECTION OF TORTURE IS A MORAL ABSOLUTE**

**The Committee on International Human Rights, 2005** [The Association of The Bar of the City of New York in conjunction with The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law, "Torture By Proxy: International And Domestic Law Applicable To 'Extraordinary Renditions,'" The Record of The Association of The Bar of the City of New York, l/n]

E. Guidance Provided by International Law on Criminal Liability

Torture is universally proscribed. The community of states has recognized the egregiously transgressive nature of torture, and international human rights and humanitarian law treaties include provisions that either directly criminalize torture (for example, through the "grave breaches" provisions of the Geneva Conventions), or require that states party criminalize torture in their domestic legal regimes (for example CAT, or the ICCPR, as interpreted by the Human Rights Committee). Individuals acting either as agents of a state, or as private actors, can be held accountable for torture as an international crime. n378 Reflecting the seriousness of the offense of torture, an evolving body of international law also requires criminalization and prosecution of ancillary acts, such as complicity to, and aiding and abetting, torture. This body of law is reflected in multilateral treaties that set out legal standards and a basis for criminal sanctions, and also in the norms of customary

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international law. n379 Although not all of this body of law is directly binding on the United States, it offers useful guidance to the United States in interpreting its own obligations under the treaties to which it is party, and a set of principles, applied by international courts [\*119] and tribunals, that the United States should follow in its domestic prosecutions of alleged acts of torture or conspiracy in torture.

### **EVEN IF WE ACCEPT THEIR ARGUMENT THAT TORTURE IS SOMETIMES JUSTIFIED, TORTURE AS A RULE SHOULD ALWAYS BE STRICTLY PROHIBITED.**

**HAREL, 2008**, PHILLIP P. MIZOCK & ESTELLE MIZOCK CHAIR IN ADMINISTRATIVE AND CRIMINAL LAW AT THE HEBREW UNIVERSITY LAW FACULTY, AND SHARON, PHD CANDIDATE AT STANFORD UNIVERSITY PHILOSOPHY DEPARTMENT [ALON, ASSAF, "CAN WE EVER JUSTIFY OR EXCUSE TORTURERS?," JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 2008 6(2):241-259,

[HTTP://JICJ.OXFORDJOURNALS.ORG/CGI/CONTENT/FULL/6/2/241](http://jicj.oxfordjournals.org/cgi/content/full/6/2/241)]

In general, rules ought to guide the behaviour of individuals via their role in their practical deliberations. When conducting themselves individuals ought to incorporate rules into their practical reasoning and follow the rules which apply to them.

The incorporation of exceptions into the prohibition on torture requires agents who wish to follow these rules to consider the permissibility of torture even when they do not eventually act on it. Yet, there is something morally corrupt in incorporating this idea into one's reasoning — it transforms the prohibition on torture into a circumstantially restricted prohibition. By incorporating a principled exception to the rule prohibiting torture an agent who considers what to do in a particular case is invited to consider the possibility that torture is permissible. Even when torture is eventually rejected on the grounds that the circumstances do not call for it, the permissibility of torture has been admitted into the rule-like directive guiding one's reasoning. Yet, under the view we propound, when the circumstances do not justify torture, torture ought not to be merely rejected; rather, it need not even be considered as an option that is to be weighed against other alternatives. Endorsing the idea that torture may be permissible as a rule undermines the categorical status of the prohibition on torture. Since torture is categorically prohibited, it is, as a general rule, normatively excluded at the outset from the range of permissible acts. Thus, according to the deontological model provided here, if the circumstances are such as to require the agent not to torture, the agent ought to act exclusively for the reason that there is a rule forbidding torture. If, in contrast, the circumstances dictate that torture is inevitable, the agent ought to torture exclusively for the sake of saving the innocent victims' life.

To sum up, the incorporation of a set of exceptions into the rule prohibiting torture is wrong because it 'normalizes' torture; it implies that the prohibition on torture is a conditional prohibition which can be outweighed by stronger considerations. By turning the singular case of practical necessity into a rule, one turns a categorical prohibition into one that is conditional on circumstances.

## **Torture Exceptions Cause Slippery Slope**

### **MAKING EXCEPTION FOR EXTREME TERRORIST CIRCUMSTANCES SNOWBALLS**

John T. Parry & Welsh S. White, **Law Professors-University of Pittsburgh, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 188

Authorizing law enforcement officials to use torture even in extremely limited circumstances would also send a variety of undesirable messages. Once torture is available for terrorists in extreme circumstances, someone inevitably will demand it in less extreme circumstances, and then for suspected serial rapists or murderers, or even for those accused of lesser crimes. The slippery slope problem with torture and the related risk of abuse is real, and the harms that would inevitably result from a loosening of standards are significant. Authorizing torture would also betray well-established constitutional values and teach citizens that principles are among the first things to be jettisoned in an emergency.

### **ALLOWING TORTURE FOR EXTREME CIRCUMSTANCES SUBJECT TO SLIPPERY SLOPE**

M. Katherine B. Darmer, **Law Professor, Chapman University, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 201

Clarke illustrates in his recent article, “Creating a Torture Culture,” that the use of torture is not easily cabined. Rather: “Once started, torture and other abusive practices spread. Their logic cannot be easily contained. If it is right to torture in the extreme situation, what about a slightly less extreme case?...In every case, harsh practices can be justified on the ground that the person being questioned may harbor information that could save innocent lives.”

Relying on history and behavioral science studies, Clarke also points out that torture is a “true slippery slope.” Most of us are capable of torture and, “in the absence of enforced prevention rules, systematic abuses become prevalent.”

### **PREEMPTION JUSTIFIES TORTURE AGAINST INNOCENT PEOPLE WHO COULD BE “FUTURE TERRORISTS”**

**BRECHER, 2007**, SENIOR LECTURER OF APPLIED PHILOSOPHY IN THE HUMANITIES DEPARTMENT AT BRIGHTON POLYTECHNIC, AUTHOR OF ARTICLES ON ETHICS AND SOCIAL PHILOSOPHY WHICH HAVE BEEN PUBLISHED IN THE JOURNAL OF MEDICAL ETHICS (BOB, *TORTURE AND THE TICKING BOMB*, PP.59)

In short, why not extend interrogational torture beyond just those circumstances where, since time is most pressing, it is least likely to succeed? Why not use it, as other interrogational methods are used, to pre-empt ticking bombs? After all, surely pre-empting ticking bombs is preferable to dealing with them. Given the central role of pre-emptive attacks in the “war on terror”, surely pre-emption is no less to the point here? [40]

Why not go even further, and consider the use of intimidatory torture as a means of seriously putting people off joining terrorist organizations, and/or becoming potential bomb-planters, in the first place? If torture sometimes works as a means of getting information, as its advocates claim it does, why would it not work just as well as an intimidatory tool? It has often enough been used to intimidate people, and with all too much success (though with “counter-productive” consequences as well): consider Nazi-occupied Europe, Chile under Pinochet, Greece under the Colonels, China, Guatemala, El Salvador, Honduras and, more recently, Burma, Sierra Leone, Liberia, Zimbabwe and Iraq, to name just a few. [41] Of course, it is the case that ‘it appears that the implicit assumption of most of the people who consider ticking bomb examples is that the interrogee is, in some way, responsible for the creation of the danger itself’. [42] The advocates both of legalizing interrogational torture and of non-legal interrogational torture all assume or insist that the interrogators know that their captive knows where the bomb is (however implausibly, as we saw in the previous chapter). But why limit it to the allegedly guilty terrorist, if it is the consequences alone which justify or fail to justify an action?

### **THE ROUTINIZATION OF TORTURE ESTABLISHES A NEW SET OF MORALS THAT LEGITIMIZES INDIVIDUAL AUTHORITY OVER OTHERS**

**BRECHER, 2007**, SENIOR LECTURER OF APPLIED PHILOSOPHY IN THE HUMANITIES DEPARTMENT AT BRIGHTON POLYTECHNIC, AUTHOR OF ARTICLES ON ETHICS AND SOCIAL PHILOSOPHY WHICH HAVE BEEN PUBLISHED IN THE JOURNAL OF MEDICAL ETHICS (BOB, *TORTURE AND THE TICKING BOMB*, PP.68-69)

As Ronald Crelinsten graphically details, the profession of torturer – in common with other professions – develops an internal dynamic. It seeks to expand its own scope, protect its members and so on: ‘the very process of routinization of torture involves a kind of continuous and dynamic distortion of facts and events

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which, in the end, amounts to the construction of a new reality'. [75] The inculcation of obedience to authority, the creation of "enemies", the need to achieve "results" to justify resources, leading to finding ever more such "enemies" and the expansion of what counts as information all lead to the creation of a particular social reality. And 'This socially constructed reality – the routine of torture – replaces objective reality with one that is presumed to exist. In doing so, it also supplants conventional morality, substituting in its place the ideological dictates of the authority structure within which torture occurs.' [76] Think of Turkey, Colombia and more recently Afghanistan, Guantanamo Bay and Iraq. Or as Amnesty International puts it, 'those who torture once will go on using it, encouraged by its "efficiency" in obtaining the confession or information they seek, whatever the quality of those statements. They will argue within the security apparatus for the extension of torture . . . they may form elite groups of interrogators to refine its practice.' [77] Legally legitimating the profession of torturer would not only give the practice itself an enormous impetus, but radically reconfigure people's conceptions of everyday decency. Slavoj Žižek has rightly pointed out that "ticking bomb" thinking is already corrupting the everyday culture of the United States, where 'The problem for those in power is how to get people to do the dirty work without turning them into monsters'. [78] In short, what a Brazilian torturer is reported to have told a prisoner would cease to appear bizarre: 'I'm a serious professional. After the revolution, I will be at your disposal to torture whom you like.' [79]

#### **ANY EXCEPTION SNOWBALLS—ONCE A JUSTIFICATION IS ACCEPTED, IT SPILLOVER TO ALL OTHER DECISIONMAKING**

**BRECHER, 2007**, SENIOR LECTURER OF APPLIED PHILOSOPHY IN THE HUMANITIES DEPARTMENT AT BRIGHTON POLYTECHNIC, AUTHOR OF ARTICLES ON ETHICS AND SOCIAL PHILOSOPHY WHICH HAVE BEEN PUBLISHED IN THE JOURNAL OF MEDICAL ETHICS (BOB, *TORTURE AND THE TICKING BOMB*, PP.60-61)

As for empirical evidence of what happens when torture is not absolutely ruled out, one need look no further than the B'Tselem paper already cited [46] and Human Rights Watch's 1992 report on Israel, the late twentieth-century testing ground no less for systematic interrogational torture than for Dershowitz's thinking about it. [47] The point – and it is a pretty obvious one, even if apparently not to a whole swathe of academics and lawyers – is this: Torture, like power, appears to be habit-forming. The rationale of torture in an age of terror – averting imminent and massive harm to civilians by torturing the right source – easily slides to cover ever more remote sources and more hypothetical harms. It is difficult to torture just a little. [48]

In the aftermath of the 1987 Landau Commission, torture became quasi-legal. Although it remained formally illegal, the explicit recognition of the retrospective defence of "necessity" meant that it was de facto legally permitted. Torturers were deemed to have acted illegally, but, in retrospect, justifiably. Hypocritical or not, the result of such legal sanction after the event was an increasing use of torture. [49] Why should the need to obtain permission have a directly contrary effect to knowing that, in effect, permission would be granted retrospectively? We are not told. However, what we do know is this. In Israel, human rights organizations and their lawyers have unearthed the abusive and opportunistic use made of the ticking time-bomb argument by the security services in order to obtain permission to torture in cases that are far removed from any kind of an immediate-danger scenario. The evidence amassed in the hundreds of suits and depositions points clearly to a cheapening of the ticking time-bomb rationale. [50]

In summary, there are three interrelated reasons why I think that legalizing torture would be likely to lead to other people than "guilty terrorists" alone being tortured. First, there is the practical likelihood of interrogators taking it as a "green light". Second, the utilitarian reasoning employed to attempt to justify the proposal would, if successful, sanction torturing people who might know where the bomb was, and also people who clearly did not know but whose torture would put pressure on someone thought to know where it was. Third, it would be a "green light" not only for interrogators, but also for politicians and academics, even further to extend the torture that is already going on. As a soldier in the then Rhodesia put it, 'When you do it [torture], you are in that condition of "conscience-narrowing" and strangely obsessed to get information. So you inflict pain, maim and kill to get what you want.' [53] The observation applies no less to politicians and academics than to soldiers or interrogators. In short, a likely outcome of legalizing interrogational torture is the normalization of torture.

**THERE IS NO MIDDLE GROUND ON TORTURE—POLICY ALWAYS SLIDE TOWARD THE EXTREMES**

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**SHUE**, PROFESSOR OF INTERNATIONAL RELATIONS AT THE UNIVERSITY OF OXFORD, **2005** [HENRY, “TORTURE IN DREAMLAND: DISPOSING OF THE TICKING BOMB,” CASE W. RES. J. INT’L L., VOL. 37:231, [HTTP://WWW.CASE.EDU/ORGs/JIL/VOL.37.2.3/SHUE.PDF](http://www.case.edu/orgs/jil/vol.37.2.3/shue.pdf)]

Either “torturers” are just thugs who have no clue what they are doing, in which case we need not allow for exceptional cases in which they rapidly and effectively extract invaluable catastrophe-preventing information, or some can have genuine expertise. Arrigo cites one of her U.S. informants: “The Air Force interrogator said he tried to interview terrorist suspects ‘before any heavy-handed ex-Turkish farmer slapped them around.’”<sup>24</sup> If expertise is available, we would certainly want it at hand in the exceptional, potentially catastrophic case. If we want it ready, we need to maintain, even nourish, the organizations and networks in which the expertise resides.

Here, then, is the really bad news. The moderate position on torture is an impractical abstraction—it is torture in dreamland. The only operationally feasible positions are toward the extremes. Gross and I (in 1978)—doubtless because we are moderate and reasonable people—have been trying to have it both ways.<sup>25</sup> I—and I leave Professor Gross to speak for himself—was like the recovering alcoholic dreaming of avoiding the extreme of total abstinence through the ‘moderate’ strategy of only a drink or two a night. That is not an option, and the alcoholic has only the extremes between which to choose. In the quarter-century since 1978 we have also learned that there is no moderate position on torture either. Torture is now rampant, and high-officials in the U.S. government are its poster-children. You cannot be a little bit pregnant, you cannot—if you are an alcoholic—have a drink only on special occasions, and you cannot—if your politicians are not angels—employ torture only on special occasions.

Michael Ignatieff, another reasonable and moderate person, hopes like Gross and me to have it both ways: “[A]n outright ban on torture creates the problem of the conscientious offender. This is a small price to pay for a ban on torture.”<sup>26</sup> If the conscientious offender is to be an effective and competent torturer, or to have them on call, he must, because of the cascading corruption of key social institutions, like medicine and the courts, that Arrigo suggests, be the tip of a bureaucratic iceberg of institutionalized torture, an iceberg that will probably be replicated nation by nation around the world—not such a small price in fact. To try to leave a constrained loophole for the competent “conscientious offender” is in fact to leave an expanding loophole for a bureaucracy of routinized torture, as I misguidedly did in the 1978 article. What is truly “utopian or naïve” is trusting the state and its subservient lawyers not to exploit every loophole zealously, a lesson we should have learned from Orwell’s 1984. The textbook for our remedial course is The Torture Papers.<sup>27</sup> One can imagine rare torture, but one cannot institutionalize rare torture. The suggestion of rare torture has no place in the real world of politics. It is an optimistic thought with no social embodiment.

As David Luban recently put it:

The real torture debate, therefore, isn’t about whether to throw out the rulebook in the exceptional emergencies. Rather, it’s about what the rule-book says about the ordinary interrogation . . . [Senator] McCain has said that ultimately the debate is over who we are. We will never figure that out until we stop talking about ticking bombs, and stop playing games with words.”<sup>28</sup>

So I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires. If the perfect time for torture comes, and we are not prepared to prevent a terroristic catastrophe, we will at least know that we have not sold our souls and we have not brutalized the civilization. These are catastrophes we actually can avoid. Some of us may, or may not, as a result of our refusal to tolerate secret torture bureaucracies and their gulags, die in some other catastrophe, but civilized principles will survive for members of future generations, who may be grateful for our sacrifice so that they could lead decent lives. About this price Ignatieff is correct: “Those of us who oppose torture should also be honest enough to admit that we may have to pay a price for our own convictions. Ex ante, of course, I cannot tell how high this price might be. . . . This is a risk I am prepared to take . . . .”<sup>29</sup> Meanwhile, our taxes fund secret detention centers into which people disappear but in which, we are assured on highest authority, in spite of a total lack of accountability no torture ever occurs. <sup>29</sup> Ignatieff, supra note 26, at 27.

## MAKING EXCEPTIONS TO TORTURE BAN FOR TERRORISM SUSPECTS RISKS SLIPPERY SLOPE

**Amnesty International**, October 27, **2004** [“Human dignity denied: Torture and accountability in the ‘war on terror’,” AMR 51/145/2004, [www.amnesty.org](http://www.amnesty.org), p. 83-84]

A country steps on to a slippery slope when it begins to chip away at the prohibition on torture and cruel, inhuman or degrading treatment. In its first major report on torture 30 years ago, Amnesty International wrote:

“History shows that torture is never limited to ‘just once; ‘just once’ becomes once again – becomes a practice and finally an institution. As soon as its use is permitted once, as for example in one of the extreme circumstances like a bomb, it is logical to use it on people who might plant bombs, or on

people who might think of planting bombs, or on people who defend the kind of person who might think of planting bombs...”.<sup>349</sup>

The USA claims to have reserved its harsh interrogation techniques for what it calls a few “high-value” detainees – that is, those detainees considered to be in possession of immediately usable intelligence. For example, the Pentagon has claimed that Secretary Rumsfeld’s December 2002 approval for use at Guantánamo of interrogation techniques including stress positions, sensory deprivation, isolation, hooding, stripping and the use of dogs to inspire fear stemmed from the need for “additional techniques... for use against highvalue detainees”, including Saudi national Mohamed al-Kahtani, suspected of being involved in the 11 September 2001 conspiracy (see page 15). <sup>350</sup> Asked about this in June 2004, Secretary Rumsfeld stated that the techniques “were not used, I’m told, on anyone one other than Kahtani. We may find out that’s not correct at some point in the future”.<sup>351</sup>

According to what released prisoners have alleged, this discovery has already occurred. Their evidence suggests that torture and ill-treatment by US personnel has not been limited to “high value” detainees. <sup>352</sup> In any event, international law prohibits torture or illtreatment regardless of the “value” it would allegedly produce.

## **Absolute Rejection of Torture Key to All Human Rights**

**TORTURE MUST BE OPPOSED ABSOLUTELY—ETHICS REQUIRES THE REJECTION OF ANY COMPROMISE BETWEEN TORTURE AND THE LAW**

**ZIZEK**, SENIOR RESEARCHER AT THE INSTITUTE OF SOCIAL STUDIES, LJUBLJANA, **2002** [SLAVOJ, *WELCOME TO THE DESERT OF THE REAL*, P. 102-106]

If, then, against these misreadings, we resist the temptation to deprive the notion of Homo sacer of its true radicality, it allows us to analyse the numerous calls for rethinking some basic ingredients of modern notions of human dignity and freedom which abound after September 11. A good example is Jonathan Alter's Newsweek magazine column 'Time to Think about Torture', with the ominous subtitle 'It's a new world, and survival may well require old techniques that seemed out of the question'. After flirting with the Israeli idea of legitimizing physical and psychological torture in cases of extreme urgency (when we know that a terrorist prisoner possesses information which may save hundreds of lives), and 'neutral' statements like 'Some torture clearly works', Alter concludes:

We can't legalize torture; it's contrary to American values. But even as we continue to speak out against human-rights abuses around the world, we need to keep an open mind about cer-tain measures to fight terrorism, like court-sanctioned psychological interrogation And we'll have to think about transferring some suspects to our less squeamish allies, even if that's hypocritical. Nobody said this was going to be pretty.<sup>47</sup>

The obscenity of such statements is blatant First, why use the WTC attacks as justification? Are there not much more horrible crimes going on around the world all the time? Secondly, what is new about this idea? Did the CIA not teach the Latin American and Third World American military allies the practice of torture for decades? Hypocrisy has gone on for decades. .

Even Alan Dershowitz's much-quoted 'liberal' argument is suspicious: 'I'm not in favour of torture, but if you're going to have it, it should damn well have court approval. The underlying logic — 'Since we are doing it in any case, better to legalize it, and thus prevent excesses!' — is extremely dangerous: it gives legitimacy to torture, and thus opens up the space for more illicit torture.

When, along the same lines, Dershowitz argues that torture in the 'ticking clock' situation is not against the prisoner's rights as an accused person (the information obtained will not be used in a trial against him, and the torture is done not as punishment, only in order to prevent the mass killing to come), the underlying premise is even more disturbing: so one should be allowed to torture people not as part of a deserved punishment, but simply because they know something? Why, then, not also legalize the torture of prisoners of war who may possess information which may save hundreds of our soldiers' lives? Against liberal Dershowitz's honesty, we should therefore paradoxically stick to the apparent 'hypocrisy': OK, we can well imagine that in a specific situation, confronted with the proverbial 'prisoner who knows' and whose words can save thousands, we would resort to torture — even (or, rather, precisely) in such a case, however, it is absolutely crucial that we do not elevate this desperate choice into a universal principle; following the unavoidable brutal urgency of the moment, we should simply do it. Only in this way, in the very inability or prohibition to elevate what we had to do into a universal principle, do we retain the sense of guilt, the awareness of the inadmissibility of what we have done.

In short, such debates, such exhortations to 'keep an open mind', should be the sign for every authentic liberal that the terrorists are winning And, in a way, essays like Alter's, which do not advocate torture outright, simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture: while — for the moment, at least — an explicit endorsement would be too shocking and therefore rejected, the mere introduction of torture as a legitimate topic allows us to entertain the idea while retaining a pure conscience (Of course I'm against torture — whom does it hurt if we simply discuss it!). Such legitimization of torture as a topic of debate changes the background of ideological presuppositions and options much more radically than its outright advocacy: it changes the entire field while, without this change, outright advocacy remains an idiosyncratic view. The problem here is that of fundamental ethical presuppositions: of course you can legitimize torture in terms of short-term gain (saving hundreds of lives) — but what about the long-term consequences for our symbolic universe? Where do we stop? Why not torture hardened criminals, a parent who kidnaps his child from a divorced spouse . . . ? The idea that, once we let the genie out of the bottle, torture can be kept at a 'reasonable' level is the worst liberal illusion — if for no other reason than that the 'ticking clock' example is deceptive: for the most part, torture is not done in order to resolve a 'ticking-



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clock' situation, but for completely different reasons (to punish or break down the enemy psychologically, to terrorize the population to be subdued, and so on). **Any consistent ethical stance must completely reject such pragmatic-utilitarian reasoning.** Moreover, I am again tempted to conduct a simple mental experiment: let us imagine an Arab newspaper making the case for the torture of American prisoners — and the explosion of comments about fundamentalist barbarism and disrespect for human rights this would provoke! Of course, we should be fully aware of how our very sensitivity to torture — that is, the idea that torture is against the dignity of a human being as such — grew out of the ideology of modern capitalism itself: in short, the critique of capitalism is a result of capitalism's own ideological dynamics, not of our measuring it according to some external standard.

Far from being a single event, the topic of torture has persisted in 2002: at the beginning of April, when the Americans got hold of Abu Zubaydah, presumed to be the al-Qaeda second-in-command, the question 'Should he be tortured?' was openly discussed in the mass media. In a statement broadcast by NBC on 5 April, Donald Rumsfeld himself claimed that his priority is American lives, not the human rights of a high-ranking terrorist, and attacked journalists for displaying such concern for Zubaydah's well-being, thus openly clearing the way for torture; the saddest spectacle, however, was that of Alan Dershowitz who, in the guise of a liberal response to Rumsfeld, while accepting torture as a legitimate topic for discussion, in fact argued like the legalist opponents of the annihilation of the Jews at the Wannsee Conference. His reservations were based on two particular points: (1) the case of Zubaydah is not a clear case of the 'ticking-clock' situation — that is, it is not proven that he actually knows the details of a particular imminent mass terrorist attack which could be prevented by gaining access to his knowledge through torture; (2) torturing him would not yet be legal — in order to do such a thing, one should first engage in a public debate and then amend the US Constitution and publicly proclaim in what areas the USA will no longer abide by the Geneva Convention, which regulates the treatment of enemy prisoners . . . If ever there were an ultimate ethical fiasco of liberalism, this was it.

This reference to Wannsee is by no means a rhetorical exaggeration. If we are to believe the HBO docudrama about the Wannsee Conference, an old conservative lawyer there, shattered by the implications of the proposed measures (millions of Jews illegally liquidated), protested: 'But I visited the Fuhrer a week ago, and he assured me solemnly that no Jew will suffer from illegal violent measures!' Reinhard Heydrich, who presided over the meeting, looked him in the eyes and, with a mocking smile, replied: 'And I am sure that if you ask him the same question again, he will give you the same reassurance!' The shattered judge got the point: that **Nazi discourse operated on two levels; that the level of explicit statements was supplemented by an obscene unacknowledged underside.** If we can rely on the surviving proceedings, then, throughout the conference, that was the central bone of contention between the hardline executives and 'legalists' like the judge who drafted the Nuremberg racial laws: while he passionately emphasized how much he hated the Jews, he nevertheless insisted that there were no proper legal grounds for the radical measures they were debating. The problem for the 'legalists' was thus not the nature of the measures, even less anti-Semitism as such, but their worry that such measures were not properly allowed in law — **they were frightened to confront the abyss of a decision that was not covered by the big Other of the Law, by the legal fiction of legitimacy.** Today, with the post-political regulation of the life of Homo sacer, this last reservation of the Nazi legalists has faded away: there is no longer any need to cover administrative measures with the legal big Other.

## REJECTION OF TORTURE CRITICAL TO MORALITY AND ALL HUMAN RIGHTS

**The Committee on International Human Rights, 2005** [The Association of The Bar of the City of New York in conjunction with The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law, : "Torture By Proxy: International And Domestic Law Applicable To 'Extraordinary Renditions,'"

The Record of The Association of The Bar of the City of New York, l/n]

F. Extraordinary Renditions in the Context of the "War on Terror" Violate International Law

There is an inherent tension between the need to obtain potentially life-saving information through interrogation of terrorist suspects and the legal requirement of upholding the anti-torture standards in the treaties to which the United States is a party. Still, "condoning torture under any circumstances erodes one of the most basic principles of international law and human rights and contradicts our values as a democratic state." n441 Torture harms not only the detainees, but also interrogators and our society. The universal condemnation of the abuses that have come to light at Abu Ghraib prison and other U.S. detention facilities in Iraq and Afghanistan have damaged this nation's standing in the community of nations, and have served to fuel the enmity of those who seek to harm U.S. citizens [\*132] and U.S. interests domestically and abroad. Extraordinary Renditions may be one step removed from the direct torture of detainees by U.S. agents, but to condone any level of U.S. involvement in the interrogation by torture of detainees remains **wrong and immoral**. This position is reflected in international law, which, as discussed above, prohibits both torture and complicity to torture, including, as discussed below, in the context of terrorism and national security emergencies.

1. The Prohibition Against Torture is Absolute and Non-Derogable

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Article 2(2) of CAT provides that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." n442 The absolute nature of this prohibition was specifically included in CAT to distinguish freedom from torture as one of "the few fundamental rights of the individual" from which no derogation is permitted under international law, even in times of war or other emergency. n443 After the terror attacks of September 11, 2001, as the United States geared up its "War on Terror," the CAT Committee issued a statement in which it condemned the terror attacks, expressed "profound condolences to the victims, who were nationals of some 80 countries, including many States parties to [CAT]," but reminded states of the non-derogable nature of CAT obligations. n444 The CAT Committee highlighted the obligations contained in article 2 (prohibition of torture under all circumstances), article 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and article 16 (prohibiting CID treatment or punishment). The Committee added that these provisions must be observed in all circumstances, and expressed confidence that "whatever responses to the threat of international terrorism are adopted by States parties, such responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture." n445

Unlike CAT, each of the ICCPR, the European Convention and the American Convention contains provisions permitting certain derogations from human rights obligations in specific circumstances. n446 Each of these conventions is clear, however, that certain rights are always non-derogable. Paradigmatic among these is the prohibition against torture. n447 Even derogation from other rights is only permitted in the special circumstances and according to the specified limits defined in each of the three treaties. Under the ICCPR, any such measures must be of exceptional character, n448 [\*134] strictly limited in time n449 and to the extent required by the exigencies of the situation, n450 subject to regular review, n451 consistent with other obligations under international law, and must not involve discrimination. n452 Each of the three treaties further requires that formal notice be given to the secretary-general of the United Nations or the relevant regional organization, detailing which provisions a state has derogated from and the reasons for such derogation. n453 Thus, in 2001, when its anti-terrorism legislation was adopted, the United Kingdom filed notices of derogation under the ICCPR n454 and the European Convention. n455 The United States has filed no such notice of derogation under the ICCPR [\*135] or any other human rights or humanitarian law treaty to which it is a party.

### MORALITY REQUIRES AN ABSOLUTE BAN ON TORTURE

**Amnesty International**, October 27, 2004 [*"Human dignity denied: Torture and accountability in the 'war on terror'."* AMR 51/145/2004, [www.amnesty.org](http://www.amnesty.org), p. 88-89]

In the end, however, the absolute prohibition of torture and cruel, inhuman or degrading treatment in international law rests firmly on moral grounds. It is about what sort of society we aim to build. Ariel Dorfman's country, Chile, suffered gross human rights violations on and following 11 September 1973, the day of the coup that brought Augusto Pinochet to power. Dorfman has written:

"[T]orture is not a crime committed only against a body, but also a crime committed against the imagination. It presupposes, it requires, it craves the abrogation of our capacity to imagine someone else's suffering, to dehumanise him or her so much that their pain is not our pain. It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the same numbness, those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts."<sup>371</sup>

### MORAL OBLIGATION TO ABSOLUTELY REJECT TORTURE

**Hall**, counsel and senior researcher in the Europe and Central Asia Division of **Human Rights Watch**, April 2004 [Julia, *"Empty Promises: Diplomatic Assurances No Safeguard against Torture,"* Human Rights Watch April 2004 Vol.16 No.4 (D), available on [www.hrw.org](http://www.hrw.org), p. 3-4]

Governments around the world have legitimate security concerns in the face of violent terrorist attacks. Some governments, however, are returning alleged terrorist or national security suspects to countries where they are at risk of torture or ill-treatment.<sup>1</sup> Governments have justified such acts by relying on diplomatic assurances—formal guarantees from the government in the country of return that a person will not be subjected to torture upon return.<sup>2</sup> States secure diplomatic assurances in advance of return and claim that by doing so, they comply with the absolute prohibition in international law against returning a person—no matter what his or her alleged crime or status—to a place where he or she would be at risk of torture or ill-treatment. Some states appear to be returning people based on diplomatic assurances with the knowledge that torture will be used upon return to extract information and confessions regarding terrorist activities and associations.<sup>3</sup> Governments sometimes also engage in post-return monitoring of persons they transfer, implying that such monitoring is an additional safeguard against torture.

The United Nations Security Council, however, requires that all measures to combat terrorism must conform with member states' international human rights obligations.<sup>4</sup> The absolute prohibition against torture, including the prohibition against returning a person to a place where he or she would be at risk of torture or ill-treatment, is a cornerstone of human rights protection.<sup>5</sup> There has long been consensus among states that the prohibition against torture is among the rights so fundamental to the preservation of human dignity that there can be no justification for their violation, even in a climate of fear generated by acts of terrorism. This widespread commitment to respect for human life and the rule of law stands in stark contrast to the disdain for these principles shown by terrorists.

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## **War/Security Context Heightens Need to Strictly Prohibit Torture**

### **CONTROLS ON TORTURE EVEN MORE IMPORTANT DURING WAR TIME**

Jeremy Waldron, Law Professor-NYU School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 168-9

The important point is that the use of torture is not an area in which human motives are trustworthy. Sadism, sexual sadism, the pleasure of indulging brutality, the love of power, and the enjoyment of the humiliation of others—these all-too-human characteristics need to be kept very tightly under control, especially in the context of war and terror, where many of the usual restraints on human action are already loosened...Remember too that we are not asking whether these motives can be judicially regulated in the abstract. We are asking whether they can be regulated in the kind of circumstances of fear, anger, stress, danger, panic, and terror in which, realistically, the hypothetical case must be posed.

## **Relaxing Torture Prohibition Risks Torture of Innocents**

### **ALLOWING TERRORIST EXCEPTION FOR TORTURE RISKS TORTURING INNOCENT PEOPLE**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 201

Moreover, while some of those classified as “enemy combatants” have in fact been terrorists, others have not been. In demonizing the enemy and acting as though we are justified in treating such a class of persons as “outside the law,” we run the grave risk that innocents will be victims, as they have been in the past. As Clarke points out, “experts estimate that eighty percent of people tortured by our forces and our South Vietnamese allies during the Vietnam War were wholly innocent people who were in the wrong place at the wrong time.”

## **No Justification for Treating Non-Citizens Different**

### **US LAW ENFORCEMENT AGENTS SHOULD BE SUBJECT TO THE SAME RESTRICTIONS ON INTERROGATING A CITIZEN OR A NON- CITIZEN**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 212

In addressing the issue as “a matter of first impression,” Judge Leonard B. Sand asked whether a nonresident alien defendant’s non-Mirandized statements were admissible at trial in the United States when the statements were the result of interrogations conducted abroad by US law enforcement officials. The court concluded that the Fifth Amendment’s right against self-incrimination applies to the extent that the alien suspect is on trial in the United States. In addition, US law enforcement agents conducting investigations abroad should still use the familiar *Miranda* warnings framework, “even if the interrogation by US agents occurs wholly abroad...while the defendant is in the physical custody of foreign authorities.”

### **SUPREME COURT HAS RULED THAT FIFTH AMENDMENT PROTECTIONS APPLY REGARDLESS OF CITIZENSHIP STATUS OF SUSPECTS**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 212-3

The court refused to define the issue as one of the extraterritorial application of the Fifth Amendment, despite the government’s argument that it should. The government’s definition of the issue as whether Fifth Amendment rights “reach out to protect individuals...outside the United States” failed to convince the court because “any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant’s involuntary statements are actually used against him at an American criminal proceeding.” Therefore, according to this court, the admissibility of custodial confessions hinges upon the scope of the privilege as it applies to a nonresident alien defendant currently subject to American domestic criminal proceedings.

The court noted that the “expansive language” of the Fifth Amendment “neither denotes nor connotes any limitation in scope.” The use of “no person” instead of the familiar phrase “the people” suggests that the right against self-incrimination applies “without apparent regard to citizenship or community connection.” The Supreme Court has already determined that the Fifth and Fourteenth amendments’ due process protections apply without limitation to “every one.” Judge Sand determined that even without an explicit Supreme Court ruling granting the privilege against self-incrimination in this context, the circumstances exemplified the widely accepted notion that these protections apply “universally to any criminal prosecution brought by the United States within its own borders.” Notably, the US Supreme Court has defined the right against self-incrimination as a “fundamental trial right of criminal defendants.” Finally, Judge Sand believed that the underlying policies of the Fifth Amendment “are no less relevant when the criminal defendant at issue is an unconnected, non-resident alien.”

### **FIFTH AMENDMENT IMPORTANT FOR NON-CITIZENS AS WELL**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 213

Judge Sand further held that “a principled, but realistic application of *Miranda*’s familiar warning/waiver framework...is both necessary and appropriate under the Fifth Amendment.” *Miranda* is required because “the inherent coerciveness of [police interrogation] is clearly no less troubling when carried out beyond our borders and under the aegis of a foreign stationhouse.”

## **AT: “Terror Suspects Require Harsher Interrogation Methods”**

### **NO GENERALIZATION ABOUT HOW TERROR SUSPECTS RESPOND TO INTERROGATION**

John T. Parry & Welsh S. White, **Law Professors-University of Pittsburgh, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 184

Are suspected terrorists likely to be hard-core suspects in the sense that they will refuse to disclose information? Obviously, suspected terrorists cannot all be placed in a single category. Even aside from the fact that many of those suspected of terrorism may be innocent, some suspects who are connected with terrorist activity will be so naïve and vulnerable that they may easily be induced to speak through psychologically oriented interrogation tactics. On the other hand, some individuals are undoubtedly so committed to terrorist objectives that they would be adamant in their refusal to disclose useful information to the police.

## **AT: “Torturing Terrorists Justified by Ticking Time Bomb”**

### **HYPOTHETICALS LIKE THE “TICKING TIME BOMB” DON’T JUSTIFY TORTURING TERRORISTS**

John T. Parry & Welsh S. White, *Law Professors-University of Pittsburgh, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 186

We believe the answer in that situation is yes, regardless of the legal status of torture. That is, under extreme “ticking time bomb” circumstances, torture may be the least worse choice. But this hypothetical proves little. Anyone can devise a fact pattern that would convince nearly everyone to permit torture under the specific circumstances. The normal case—if there is such a thing—in which officials will be tempted to torture is likely to depart significantly from our hypothetical. For example, law enforcement rarely will have specific information about the nature, location, and timing of the attack, the group carrying it out, or the identities of those who have knowledge of the attack. In fact, officials may not even know whether there is a specific attack planned at all.

The more likely case is the one currently facing the federal government with some of those captured in the aftermath of September 11: law enforcement officials have captured someone whom they have reason to believe is a member of a terrorist group, and they seek information from that person about past attacks and possible future attacks. Put differently, officials may interrogate for the purpose of solving past crimes, gathering additional information about past crimes whether or not they have already been solved, and obtaining information that would help foil future attacks whether or not any particular attacks are on the drawing board. Officials may have reason to believe that the person they have captured knows something about past attacks or future plans, but they cannot be sure. If the suspect refuses to provide any information (or worse, mocks their efforts), they may become frustrated and angry. In such cases, should torture be an option?

In rough terms, we believe the Israeli approach provides the best answer. Torture is categorically illegal under international law, the federal Constitution and statutes, and state law. Regardless of the claimed purpose or need, it should remain so. No court, legislature, or executive official should encourage or condone torture in any way. In addition, victims of torture should have the full array of available remedies: criminal prosecutions, damages actions, and injunctive relief where appropriate.

### **HYPOTHETICAL SCENARIOS SHOULD BE REJECTED—THE ABSTRACTION OF THE TICKING TIME BOMB OVERSIMPLIFIES THE REAL WORLD SITUATIONS OF WARFARE—THIS THOUGHT PROCESS JUSTIFIES THE WORST FORMS OF VIOLENCE, SUCH AS TORTURE**

**FALKOFF**, ASSISTANT PROFESSOR, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW, **2009** [MARC D., “ESSAY: TORTURE AND HABEAS CORPUS AS INFORMATION-FORCING DEVICES,” NORTHERN ILLINOIS UNIVERSITY LAW REVIEW, VOL. 29, NO. 425, DECEMBER, SPRING, , L/N, [CL]]

It is of course true, as we all see immediately, that the ticking time bomb story is highly stylized and artificial. The sole purpose of the torture in the hypothetical is to collect information to prevent a catastrophe; torture is presented in the hypothetical as an exception to normal state action and not the rule, so that it does not raise the specter of state tyranny; and the torturer, like Jack Bauer when he is not in one of his depressive funks, is motivated solely by preventing the looming catastrophe, with no sully hint of cruelty in his actions. All of this is crystallized in the “ticking time bomb” scenario, whose purpose is to persuade liberals to concede a single situation where even he would torture, and having obtained this concession, prove that he really does not have a principled stand against torture. As Luban says, once you accept that torture is okay in this situation, “all that is left is haggling about the price.” n22

I will concede that even I am a victim of this highly stylized story. I can state forthrightly that if I had someone strapped into a chair and I knew for certain that he had the key to dismantling a nuclear bomb that was set to go off in Times Square in two hours and that he would not talk unless I twisted a knife into his knee . . . then sure, I would do it. I am, therefore, willing to admit that my opposition to torture is not categorical and that it may in a sense be unprincipled. [\*431]

It is easy, of course, to get seduced by simplistic examples that misrepresent the world we actually live in and by cheating around the difficulties of real life. How do we know that our suspect has the keys to the bomb? How do we know that torturing him will provide us with accurate information? Are we really sure that we have the right person? How sure do we have to be? Ninety percent? Seventy-five? Fifty?

In the real world, there is no pure safety; we live with risk, and our goal can only be to comprehend the true nature and likelihood of the risks and then seek to lower them. That means that the best response to the “ticking



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time bomb" hypothetical is not to ignore it; indeed, the hypothetical is persuasive only because it is artificial and divorced from any empirical evidence. The hypothetical must be countered with information, so that the public may make a reasoned judgment about the real-life likelihood that torture will ever prevent a ticking time bomb from exploding. In other words, we must gather information ourselves about whether our torture regime is working in the way that our political leaders claim that it is and whether it is truly reducing risks to our security. The right strategy is not to deny that abusive interrogations are necessary in order to gather intelligence, to dismiss the very notion that coercion is a regrettable but necessary tool to protect our national security, or to assert that the proffered need for gathering intelligence is always a "false" motive put forth by a torture regime. n23 Rather, the best strategy is to demonstrate to the public that we have in fact abused, coerced, and tortured prisoners who were innocent of all wrong-doing and that the information we have gathered from coercive interrogations has turned out to be just as untrustworthy as experts have warned. n25 [\*432]

### **EXTENDING MIRANDA PROTECTIONS DOESN'T MEAN POLICE CAN'T INTERROGATE ABOUT THE TICKING TIME BOMB**

Stuart Taylor, Jr., Editor, *National Journal*, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 223

But Miranda's holding that it is illegal to use a suspect's un-Mirandized statements to prosecute him did not make it illegal to extract such statements in the first place. The reason that most people have long assumed the opposite is that the primary purpose of interrogating a suspect has almost always been to obtain evidence to prosecute that person. So the ban on using un-Mirandized statements in court has, in practice, been treated as a ban on interrogating a suspect without Miranda warnings.

But what if the arrested suspect—such as the US citizens accused of seeking to blow up an airliner over Detroit on Christmas Day and to set off a car bomb in Times Square on May 1 – may have information that could save lives by thwarting planned attacks or leading authorities to confederates?

In such a case, the primary goal should be to extract as much information as possible as fast as possible to protect public safety. And as long as this information is not used to prosecute the suspect, there is no violation of either the Fifth Amendment self-incrimination clause or Miranda, because there is no compulsion "to be a witness against himself." The Court made this clear in a 2003 case, *Chavez v. Martinez*.

### **THE TICKING BOMB SCENARIO IS NEARLY IMPOSSIBLE AND ASSUMES THAT A WHOLE SERIES OF UNLIKELY EVENTS TO LINE UP PERFECTLY. ADOPTING PRACTICES, TORTURE, UPON SUCH AN IDEALIZED SITUATION UNDERMINES LEGITIMACY AND THEREFORE CIVILIZATION.**

SHUE, PROFESSOR OF INTERNATIONAL RELATIONS AT THE UNIVERSITY OF OXFORD, 2005 [HENRY, "TORTURE IN DREAMLAND: DISPOSING OF THE TICKING BOMB," CASE W. RES. J. INT'L L., VOL. 37:231, [HTTP://WWW.CASE.EDU/ORGs/JIL/VOL.37.2.3/SHUE.PDF](http://www.case.edu/orgs/jil/vol.37.2.3/shue.pdf)]

In part thanks to Gross' critique the multiple reasons why ticking-bomb hypotheticals seem "artificial" are clearer to me now. One reason is that they are idealized. They are not simply imaginary but unrealistic, like an imaginary alcoholic who drinks two beers only a night. There are former alcoholics, who do not drink at all, and active alcoholics. To think that there may be rare alcoholics who drink moderately is to fail to understand alcoholism. Similarly, history does not present us with a government that used torture selectively and judiciously.<sup>16</sup> Are we to believe that America is likely to be the first alcoholic in history who can take only one drink? The first state apparatus that will use torture judiciously and selectively? Are American politicians so superior to mere mortals?

Gross is confident that what he calls "catastrophic cases" are "real, albeit rare."<sup>17</sup> If catastrophic cases had only the one feature of involving extremely high stakes in human life, yes, catastrophic cases would be "real, albeit rare"—perhaps not even so rare. But the high stakes are the only realistic feature in the ticking-bomb hypothetical. Its other features are all too good to be true, especially to be true in conjunction: the right man and the prompt right result and the judicious decision to refrain from all further torture until the next genuine catastrophe almost certainly looms. This happy conjunction is not rare—it is virtually impossible given the kind of people who rise to the top in politics. What would be "utopian or naive" would be to believe that the kind of people who are running the so-called "War on Terrorism" would, if they had discretion about using torture in secret—against "ghost detainees" in "black sites," say—choose to restrain themselves in spite of the impossibility of accountability.

The Alice-in-Wonderland character of the assumption that the use of torture will not be widespread throws into doubt the location of the catastrophe. Gross, along with most people who appeal to the ticking-bomb hypothetical, take it to be beyond dispute that the catastrophe lies on the side of not torturing: we are too squeamish to torture the terrorist who

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planted the bomb, and the bomb explodes, bringing the catastrophe of death and destruction. One other possibility is that catastrophe lies on the side of undermining the taboo against torture. Then other nations will reason that if the superpower with its thousands of nuclear weapons and high-tech conventional forces cannot maintain its own security without the liberal use of secret torture, they can hardly be expected to defend their security without far more torture. And what currently passes for civilization may then slide backward in the general direction of the eighth century. That too would be a catastrophe, a civilizational catastrophe. I am not predicting a full return of barbarism. Yet it is clear that idealizations that cause the epidemic nature of torture to evaporate from view are no guide for practical action. My honest judgment is that stories that are too good to be true are not true rarely, but false. The ticking-bomb hypothetical is too good to be true—it is torture conducted by wise, self-restrained angels.

## **AT: “Torture Key to Obtain Information Necessary to Protect National Security and Soldiers”**

### **US JUSTIFYING TORTURE AGAINST TERROR SUSPECTS COUNTERPRODUCTIVE**

John T. Parry & Welsh S. White, *Law Professors-University of Pittsburgh, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 188

A claim by the United States that it may torture in extreme circumstances would have serious international consequences as well. Such a claim would undermine the “painfully won and still fragile consensus” against torture. Absent an absolute ban on torture, other countries or even terrorist groups could claim they were simply following the example of the United States. The frequency of torture in many countries could increase, which would also increase the chance that a US national would be tortured if kidnapped or captured by terrorists or the military forces of another country.

### **EQUIVOCATING ON TORTURE INCREASES RISKS TO US SOLDIERS**

M. Katherine B. Darmer, *Law Professor, Chapman University, 2011*, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 200

Equivocating on torture not only causes us to lose moral standing on the international stage but also places our own soldiers at risk. As Professor Philip B. Heymann points out, if we approve torture in particular circumstances, other countries will do the same. It was that concern that led us to accept Geneva Convention prohibitions on torture, despite the cost of obtaining information that “might save dozens of American lives.

### **TORTURE DOESN'T WORK—VIETNAM, CHILE, GUATEMALA, OTHER EMPIRICS AND ELSEWHERE PROVE, AS WELL AS INTERNATIONAL AND FURTHER TERRORIST BACKLASH**

**HAJJAR, 2009**, CHAIR OF THE LAW AND SOCIETY PROGRAM AT THE UNIVERSITY OF CALIFORNIA, SANTA BARBARA AND AN EDITOR OF MIDDLE EAST REPORT [LISA, “AMERICAN TORTURE: THE PRICE PAID, THE LESSONS LEARNED,” 7/01, [HTTP://WWW.MERIP.ORG/MER/MER251/HAJJAR.HTML](http://www.merip.org/mer/mer251/hajjar.html)]

Torture Doesn't Work

America's disastrous past experiences with torture—in Vietnam, Chile and Guatemala, to name a few—should have been lesson enough to deter officials from authorizing torture after 9/11. But now we have a fresh opportunity to learn some lessons. First, torture cannot be employed with strategic precision; there is institutional “creep” as the use of techniques spreads and there is the inevitable and, in the US case, immense, imprecision of torturing innocents. Second, torture is ineffective in enhancing security; on the contrary, states that do not torture (or extra-judicially execute) prisoners experience substantially less terrorism, and their counter-terrorism efforts are more effective.[16] What the US lacked and desperately needed after 9/11 was human intelligence about al-Qaeda and affiliated organizations. But the decision to authorize torture to compensate for the lack of intelligence had the reverse effects: By indiscriminately arresting innocent people, and by subjecting so many prisoners to violent and dehumanizing treatment, the quest for intelligence assistance and cooperation in critically important communities, let alone “hearts and minds” was damned. Third, the universal illegitimacy and illegality of torture brings disgrace to those who violate the prohibition. American torture squandered “we are all Americans” global empathy after 9/11 and invited righteous condemnation by allied foreign governments. The torture policy reduced domestic support and confidence in the administration, especially among military officers, legal professionals and the intelligentsia.

At a very high cost, the US case confirms that torture does not work by any measure. No modern regime or society is more secure as a result of torture. Its use spreads, its harms multiply, and its corrosive consequences boost rather than diminish the threat of terrorism.

## **AT: “Miranda Requirement for Terror Suspects Threatens Security”**

### **SHOULD NOT REQUIRE MIRANDA WARNINGS FOR TERROR SUSPECTS REGARDLESS OF CITIZENSHIP STATUS**

M. Katherine B. Darmer, **Law Professor, Chapman University, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 217-8

While the *Miranda* decision was recently reaffirmed, the Court explicitly acknowledged its mutability. Cases involving foreign interrogation of terrorism suspects present a situation ripe for another *Miranda* exception. The need for information in such cases is even more pressing than was the need for information in *Quarles*. In *Quarles* the police needed to locate a gun that they believed the suspect had discarded in a grocery store; in cases in which US agents travel overseas to interrogate terrorism suspects, the stakes are potentially much higher. Agents should be able to question suspects freely in such circumstances, without the constraints of *Miranda* and without having to establish that, before questioning began, there was an immediate safety concern that justified dispensing with *Miranda* under *Quarles*. In cases involving foreign interrogation of suspected terrorists, the courts should not require agents to advise suspects of *Miranda* rights, regardless of the citizenship of the suspect.

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**\*Detention Without Charge/Habeas Corpus Impact\***

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## **Detention Without Charge Violates Habeas Corpus**

### **DETENTION WITHOUT CHARGE IS A VIOLATION OF HABEAS CORPUS:**

<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=10673&c=206&Type=s+>

Interested Persons Memo on the Indefinite Detention Without Charge of American Citizens as 'Enemy Combatants'

September 13, 2002

#### **MEMORANDUM**

To: Interested Persons  
From: Timothy H. Edgar, ACLU Legislative Counsel  
Date: September 13, 2002  
Re: Indefinite Detention

#### **I. Indefinite Detention Without Charge of American Citizens Is Unconstitutional.**

The plan as outlined violates core constitutional guarantees which are applicable in war or other national emergency. These guarantees include the right to a trial by jury in criminal cases and the guarantee that the privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety may require it. U.S. Const. Art. I, § 9; Art. III, § 2. Likewise, the plan violates the Fifth Amendment's guarantee that no person may be deprived of liberty without due process of law.

According to precedent dating back to the Civil War, only Congress may determine that an "invasion or rebellion" exists and authorize the drastic measure of suspending the right of habeas corpus, permitting indefinite detention without judicial process. See *Ex Parte Milligan*, 72 U.S. 2, 121, 122 (1866); *Ex Parte Merryman*, 17 F. Cas. 144, 149 (D. Md. 1861) (Taney, C.J.). Likewise, only Congress may declare war, permitting the detention and trial of enemy combatants by military tribunals. *Ex Parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1, 11-12 (1946) (noting that military tribunals of combatants are "sanctioned by Congress" from "[war's] declaration until peace is proclaimed.")

The Founding Fathers included these provisions guaranteeing against confinement without judicial process specifically to prevent the Executive Branch from using its considerable power under the Constitution to abridge basic freedoms.

## **Detention Without Habeas Corpus Creates Legal Black Hole**

### **THE DENIAL OF HABEAS CORPUS TO DETAINEES AT BAGRAM WOULD CREATE WHAT GUANTANAMO COULD NOT—A PERMANENT LEGAL BLACK HOLE**

**AMNESTY INTERNATIONAL**, 18 FEBRUARY **2009** [“USA: OUT OF SIGHT, OUT OF MIND, OUT OF COURT? THE RIGHT OF BAGRAM DETAINEES TO JUDICIAL REVIEW,”

[HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/AMR51/021/2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML](http://www.amnesty.org/en/library/asset/AMR51/021/2009/EN/415F8464-CFFE-4C25-A09A-0FCE7E839709/AMR510212009EN.HTML)]

4. If Guantánamo detainees have the right to habeas corpus, why not those at Bagram?

Given that the detainees at Bagram have for a variety of reasons been deprived of any other opportunity for effective court review of the lawfulness of their detention by US forces, if the US courts were now to rule that the detainees held at Bagram do not have the right to habeas corpus, unlike those in Guantánamo, this would be to draw an arbitrary distinction between the two sets of detainees, as well as ignoring the international obligations of the USA. This distinction would in effect turn on the non-transparent executive decisions taken during the Bush administration’s term in office that resulted in some detainees being transferred to Guantánamo and held there as “enemy combatants” while others were held under the same status in Bagram.

In a memorandum written to the White House and Pentagon around the time that the Guantánamo detentions began, Justice Department officials noted the administration’s plans “regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict”. The memorandum noted that the Pentagon was “intending to make available a facility at the US Navy base at Guantánamo Bay, Cuba (GTMO), for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. At the present moment, [the Pentagon] has confined these individuals in temporary facilities, pending the construction of a more permanent camp at GTMO.”<sup>82</sup> The 2005 Church report noted that the increasing number of detainees being detained in Afghanistan by the Spring of 2002 had “threatened to overcrowd the limited facilities available there”, but that Guantánamo had been identified as “a suitable location for a long-term detention and strategic interrogation facility”.<sup>83</sup> The 2004 Jacoby review of military detentions in Afghanistan noted that “the term ‘enemy combatant’ is broad enough to encompass all individuals who are of custodial interest to the United States but who may not ultimately meet the SECDEF [Secretary of Defense] guidance for transfer to GTMO”. This guidance was contained in various secret documents, which as far as Amnesty International is aware have not been declassified.<sup>84</sup> In a media interview in 2002, Secretary Rumsfeld referred to a less than scientific screening process based on the perceived intelligence value of individual detainees.<sup>85</sup> The ICRC has pointed out that the US authorities have said that detainees at both Guantánamo and Bagram are “of important intelligence value”, so there would appear to be no categorical distinction on this basis.<sup>86</sup> Aside from the fact that they were all non-US nationals, there was no distinction based on nationality – Afghan nationals and non-Afghan nationals alike were held at both bases, with more than 100 Afghan nationals eventually transferred to Guantánamo. Neither was there distinction based on location of capture – those taken into custody inside and outside Afghanistan were held in both bases. In previous legal opinions and litigation the US government has not categorically distinguished between detainees in Bagram and Guantánamo. A Justice Department memorandum dated March 2003, for example, concerned the military interrogation of any “alien unlawful combatant” held outside the USA with no distinction drawn between those who remained in Afghanistan and those transferred to the base in Cuba. The only distinction it made was between US and non-US bases, in relation to the criminalization of torture by US agents.<sup>87</sup> Neither did the government’s October 2003 brief to the US Supreme Court in the *Rescue* case distinguish between the two sets of detainees. “The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda network and the Taliban regime. In the course of that campaign – which remains ongoing – the United States and its allies have captured or taken control of thousands of individuals... [T]he military has determined that many of those captured in connection with the hostilities in Afghanistan should be detained during the ongoing conflict as enemy combatants... The United States military has transferred some of these combatants from Afghanistan to the United States Naval Base at Guantánamo Bay, Cuba”.<sup>88</sup> Nor did the US government materially distinguish between the legal status of the detainees in Bagram on the one hand and in Guantánamo on the other when it reported to two treaty monitoring bodies in 2006. The administration told the UN Committee Against Torture and the UN Human Rights Committee that the detainees in US custody in both Afghanistan and Guantánamo were held pursuant to the Military Order signed by President Bush on 13 November 2001.<sup>89</sup> The US government also told the UN committees that for both sets of detainees “the classification of their legal status” and “the basis for their detention” had been further described in a presidential memorandum dated 7 February 2002. Among other things this memorandum described the “war against terrorism” as being a conflict of “global reach” which had ushered in a “new paradigm” requiring “new thinking in the law of war”. It stated that the USA would treat the conflict with the Taliban and al-Qa’ida as two separate conflicts, the conflict with al-Qa’ida being global in nature. None of the provisions of the Geneva Conventions would apply to “our conflict with al-Qa’ida in Afghanistan or elsewhere throughout the world”, but would apply to the conflict with the Taliban. The President determined, however, that article 3 common to the four Geneva Conventions would apply to neither al-Qa’ida nor Taliban detainees (overturned in June 2006 by the Supreme Court in *Hamdan v. Rumsfeld*), and that no detainee from either category would qualify as a prisoner of war.<sup>90</sup> The memorandum indicated that humane treatment was to be a matter of policy rather than law.<sup>91</sup> Amnesty International has called for revocation of this Order.

In its brief to the Supreme Court in the *Boumediene* case in October 2007, the Bush administration noted that “although our troops have removed the Taliban from power, armed combat with al Qaeda and the Taliban remains ongoing. In connection with those conflicts, the United States has seized many hostile persons and detained a small fraction of them as enemy combatants.”<sup>92</sup> Of those transferred to Guantánamo (the subject of the petition), it emphasised that “each of them was captured abroad and is a foreign national”. This was and remains the crucial line, as far as the government’s position that the constitution did not reach the detainees was concerned. That the government was applying its global armed conflict framework was clear from the fact that the petitioners included six men seized in Bosnia and Herzegovina and transferred to Guantánamo. According to the US government’s recent litigation in District Court opposing judicial review for Bagram detainees, whether or not the detainee held in Bagram was taken into custody while engaged in armed conflict in Afghanistan was “immaterial” to his detention. Thus, even a person detained in, for example, Thailand or United Arab Emirates in 2002, can continue to be held in indefinite detention at Bagram, according to the previous US administration (see further below). The *Boumediene* ruling, it said, has made no difference to this.

The unclear and shifting nature of the legal status of the Bagram detainees, the variety of circumstances in which they were taken into custody, and the claims to unchecked executive power made by the Bush administration, serve to illustrate the need for individualized independent judicial review of the detentions that is prepared to order the release of detainees in respect of whom the administration cannot demonstrate a clear legal authority for the detention. Vague references to international humanitarian law as ‘rethought’ by the USA, and improvisation of new legal grounds and definitions by the judiciary in order to legitimate detentions which otherwise have no clear legal basis, are simply incompatible with the international prohibition of arbitrary detention. The USA’s conduct in the “war on terror” can have left few in doubt about how the absence of judicial review facilitates arbitrary detention and other human rights violations.

5. Lawlessness by lease

The Bush administration’s strategy for denying the detainees in Guantánamo and Bagram access to the courts for judicial review of their detentions was essentially the same for each of the facilities. Because these foreign detainees were captured outside the USA and not held on sovereign US territory, the administration maintained that under US jurisprudence they had no rights to due process under the US Constitution. At the same time, in each case the USA has relied upon bilateral agreements with the ‘host’ nation,

coupled with military and political realities, to exclude any possibility of supervision or effective exercise of authority by the territorial state in relation to individual detainees. **In effect, the USA has operated a kind of lawlessness by lease.**

The USA occupies the Guantánamo base under a 1903 Lease Agreement with Cuba. Under the Agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consents that during the period of the occupation by the United States... the United States shall exercise complete jurisdiction and control over and within said areas.”<sup>93</sup> It goes without saying that military and political realities prevent Cuba from exercising any practical control over the base. The Bush administration chose its naval base in Cuba upon Justice Department advice in December 2001 that, under existing constitutional law, the federal courts could not “properly entertain an application for a writ of habeas corpus by an enemy alien” captured abroad and detained in the base because it was not “sovereign” US territory. It maintained this position until the *Boumediene v. Bush* ruling in June 2008 put an end to it. In *Boumediene*, the Supreme Court noted the “obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the [Guantánamo] base, maintains de facto sovereignty over this territory”. The governments of the USA (the “lessee”) and Afghanistan (the “host nation”) entered into an agreement in relation to Bagram air base on 28 September 2006.<sup>94</sup> The USA has the right under the agreement to assign the agreement to a “successor nation or organization”, and the agreement lasts until the United States or its successors determine that the base is “no longer required for its use”.<sup>95</sup> Under this “Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield”, the USA is given “exclusive, peaceable, undisturbed and uninterrupted possession” of Bagram airbase. This, the Bush administration argued, makes the detentions in Bagram even less subject to judicial oversight than in the case of Guantánamo, where the USA exercises “complete jurisdiction and control” under the lease with Cuba. Clearly, however, the Bagram detainees are entirely under the control of the US military authorities, as the US government itself acknowledges.<sup>96</sup> Again, the reality is that the Afghanistan government does not exercise effective authority or control over detainees held at the base.<sup>97</sup> As things stand, the question of a Bagram detainee’s release or continued detention is answered by the US authorities alone.

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When the Bush administration had urged the US Supreme Court to reject arguments that the federal courts had habeas corpus jurisdiction over the Guantánamo detainees, it argued that the only “manageable and defensible basis” for limiting habeas jurisdiction was sovereignty. It asserted that “a de facto control and jurisdiction test would serve no limiting function at all, because the US military exercises control over the detainees at Bagram Air Force Base as well”. Thus, the administration argued, any legal distinction between “aliens held at the Bagram Air Force Base in Afghanistan, which is controlled by the US military and located outside the sovereign territory of the United States, and aliens held at a facility, such as the Guantánamo Naval Base in Cuba, which is controlled by the US military and located outside the sovereign territory of the United States” would be “arbitrary”.<sup>98</sup>

However, according to the Bush administration in its 2008 litigation defending the Bagram detentions, the USA’s presence at Bagram airfield “is entirely different from that in Guantánamo Bay”, including because the “very mission of the US military force at Bagram is to assist in enhancing the sovereignty of Afghanistan”.<sup>99</sup> The administration ignored, among other things, the fact that in both places the International Covenant on Civil and Political Rights (ICCPR) applies, article 9 of which prohibits arbitrary detention and guarantees the right of anyone arrested or detained to challenge the lawfulness of their detention in court in order that that court may decide without delay on the lawfulness of his or her detention and to order his or her release if the detention is not lawful. According to the previous administration in a statement at the time the USA was before the ICCPR’s monitoring body, the UN Human Rights Committee: “The United States takes its obligations under the International Covenant on Civil and Political Rights very seriously... One thing that sets the ICCPR apart from other treaties is its enormous substantive scope covering virtually everything modern democratic societies think of as essential civil and political rights. In many senses a truly democratic society and government could not long exist without the vigilant protection of these rights.”<sup>100</sup>

The notion that a government can deny rights to those in places under its jurisdiction or control that it would guarantee to those on its sovereign territory has been described by the UN Human Rights Committee as “unconscionable”.<sup>101</sup> Such an approach strips international law of its protections and sets a destructive example for other governments to follow. Article 2.1 of the ICCPR provides that the scope of this treaty’s application should extend to “all individuals within its territory and subject to its jurisdiction”. The International Court of Justice has found that this provision “did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”<sup>102</sup> The Human Rights Committee has similarly said that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party.”<sup>103</sup>

At the heart of the Boumediene case was Section 7 of the Military Commissions Act, which reads as follows:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Before the Boumediene ruling, the US administration argued that the MCA had stripped the courts of jurisdiction to consider habeas corpus petitions from detainees held at Bagram (as well as at Guantánamo), and that foreign nationals captured and held outside the USA were not protected by the US Constitution. In July 2007, District Court John Bates denied a government motion to dismiss the habeas corpus petition of Fadi Al Maqaleh, a Yemeni detainee held in Bagram since 2003.<sup>104</sup> Judge Bates noted that the US Supreme Court had three weeks earlier agreed to take the Boumediene case. Whatever the Supreme Court eventually ruled, Judge Bates noted, its decision would “likely directly” affect the Bagram cases.<sup>105</sup>

The question of the impact of the June 2008 Boumediene ruling on the Bagram detentions is now back before the District Court. US lawyers filed habeas corpus petitions for a number of Bagram detainees challenging the lawfulness of their detention following the Boumediene ruling. In January 2009, Judge Bates heard oral arguments in the case of Fadi Al Maqaleh and three other men held at Bagram. According to the information presented before Judge Bates, Haji Wazir is an Afghan businessman who was taken into custody in Dubai, United Arab Emirates in 2002, before being transferred to Bagram via Qatar (see further below). Amin al Bakri is a Yemeni businessman, aged 39 or 40, who was seized in Thailand more than six years ago. According to his habeas corpus petition, he was abducted on 30 December 2002 as he was on the way to Bangkok airport to fly home after a short business trip in Thailand. For six months, his wife and children had no idea where he was until they received a postcard from him via the ICRC saying he was in Bagram. His habeas corpus petition conjectures that prior to being taken to Bagram, he had been held in secret custody by or for the CIA. The fourth man is Redha al-Najjar, a Tunisian national aged about 43 who was arrested at his home in Karachi in Pakistan in or around May 2002. According to his habeas corpus petition, he was arrested by Pakistani and French-speaking agents in front of his wife and child. He too, it is alleged, may have been held in secret custody by or for the CIA, and subjected to enforced disappearance for about a year and a half.<sup>106</sup>

Responding to the habeas corpus petitions, the Bush administration argued that the Boumediene ruling only invalidated MCA Section 7’s provision stripping habeas corpus jurisdiction from the courts in relation to the detentions at Guantánamo. As far as Bagram was concerned, it argued, Section 7 remained intact. The Boumediene ruling, the administration asserted,

“was predicated to a significant extent on the unique status of Guantánamo Bay: the United States has exercised what the Court described as complete jurisdiction and control over Guantánamo Bay for over a century. That exercise of jurisdiction and the distance of Guantánamo Bay from a zone of active hostilities, according to the Court, warranted the extraterritorial application of the [US Constitution’s] Suspension Clause there. The United States enjoys no similarly unbounded and indefinite control of Bagram Airfield. The US military presence at Bagram is a transient wartime necessity subject to the host nation’s sovereignty, and Bagram is, indeed, in an active war zone.”<sup>107</sup>

In its Boumediene ruling, the US Supreme Court stated that “the only law we identify as unconstitutional is MCA §7”. It did not expressly distinguish between the two parts of Section 7 – nor did it say whether the second paragraph of Section 7 remained intact – instead stating that, “we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.” In other words, the Court left open a door for the administration to oppose challenges to its treatment of detainees beyond the fact of their detention. The Bush administration chose to step through it, in relation to detentions at Bagram as well as at Guantánamo. The Bush administration argued that the Boumediene ruling is limited to the first paragraph of Section 7 of the MCA, and then only to the “core habeas function” of challenging the legality of detention, and that the second paragraph of Section 7 “remains operative”. It argued that the federal courts are prevented from considering challenges to habeas corpus petitions or any other action, “to any aspect of a detainee’s detention apart from the core habeas function of inquiring into the lawfulness of that detention.”<sup>108</sup>

Therefore, the former administration argued, the District Court should, for lack of jurisdiction, dismiss the habeas corpus petitions brought before it. Federal courts, it added, “should not thrust themselves into the extraordinary role of reviewing the military’s conduct of active hostilities overseas, second-guessing the military’s determination as to which captured aliens as part of such hostilities should be detained, and in practical effect, superintending the Executive’s conduct in waging a war”. The Bush administration had made much the same argument in the Guantánamo litigation. In its brief to the US Supreme Court in the *Rasul* case, for example, the government wrote that

“the fact that petitioners in this case are being held while active fighting is still ongoing in Afghanistan and elsewhere... only demonstrates that this litigation implicates political questions that the Constitution leaves to the President as Commander in Chief. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch.”

Such arguments were effectively rejected by the US Supreme Court in the case of the Guantánamo detentions. They should be rejected by the federal courts in the case of Bagram also.

While the Bush administration pointed to the ongoing conflict in Afghanistan as a reason to justify the detentions at Bagram, at the same time it applied the notion of a global armed conflict in defending the detentions. Thus, according to the Bush administration, whether the individual in question was taken into custody inside or outside Afghanistan, or whether he or she was engaged in actual armed conflict, it was ultimately for the unrestricted discretion of the US authorities whether to attach the label of “enemy combatant” to that person and to detain them indefinitely without charge or trial, judicial supervision or review. In seeking dismissal of the Bagram habeas corpus petitions by the District Court, the government asserted that the question of the circumstances and location of capture were “immaterial” in the Bagram cases. If the individual was a non-US national captured and held outside sovereign US territory, he or she was not protected by the US Constitution. As when it made the same argument in relation to the Guantánamo detentions, this position entirely ignored the USA’s obligations under international law.

“Given the nature of the conflict, the Bush administration added, “it would be a significant intrusion into the Executive’s ability to wage war if the military were limited to detaining only those enemies who were captured on a traditional battlefield engaging in active combat”. This limitation, it said, would be inconsistent with the AUMF “which does not have a geographic limit”.<sup>109</sup> In other words, the US military should be permitted to detain anyone anywhere and hold him or her indefinitely as an “enemy combatant” in Bagram or other overseas facilities (except now Guantánamo) without judicial review.

Jawed Ahmad (see above) said that during his time in Bagram in 2007 and 2008, he had shared a cell for five months with Haji Wazir. Haji Wazir’s case is now one of those before Judge Bates arguing that the Boumediene ruling extends to those held as “enemy combatants” in Bagram as well as in Guantánamo. Jawed Ahmad said that Haji Wazir “told me he suffered a lot and was brutally tortured during those first six months”.

According to Jawed Ahmad, Haji Wazir, a 50-year-old Afghan man with seven children who ran a foreign exchange currency business with offices in Afghanistan and Dubai, United Arab Emirates, was arrested in Dubai in 2002. From Dubai he was allegedly transferred to Qatar and then to the Panjshir valley in Afghanistan.<sup>110</sup> He was then transferred to Bagram detention facility where he remained in February 2009. His son has said that he “learned informally that my father had been seized and was being held in Bagram in 2002. We received the family’s first letter from him through the International Committee of the Red Cross in 2004.” In 2008, he spoke to his father via the video-telephone program established by the ICRC and the prison authorities earlier in the year. According to his son, Haji Wazir “appeared to be physically weak, and said that he is extremely sad and upset about what has happened to his life”.<sup>111</sup>

In its motion to have Haji Wazir’s habeas corpus petition dismissed by Judge Bates for lack of jurisdiction, the US government alleged that Wazir was taken into custody in Karachi in Pakistan. In its 16 January 2009 response to Judge Bates’ order for information on the number of detainees in Bagram, the administration admitted that this was wrong, except that the government had “correctly represented that Mr Wazir was not captured in the United States”. As far as can be gleaned from the unclassified version of the government’s response, the information as to where Haji Wazir was taken into custody has been redacted. It was not immediately apparent why the government had previously been willing to assert on the public record that he had been detained in Karachi, but was not willing to confirm or deny publicly that he had been detained in Dubai, as alleged. Nevertheless, in the earlier brief, the government had stated that even if Wazir was taken into custody in Dubai, it would make no difference to his status or his lack of entitlement to habeas corpus review in the US courts. The Bush administration asserted:

“The United States is prosecuting a war against an unconventional non-state enemy whose worldwide network of combatants wear no uniforms and carry no identity cards. They are connected by a complex and ever-evolving web of interlinked terrorist organizations and cells that operate with great autonomy but take direction from al-Qaida leadership. They also reject all laws of warfare. There is no geographic limit as to where the enemy may be hiding or found. Nor does Congress’ Authorization for Use of Military Force (AUMF) impose any geographic limit”.

The government maintains that the fact Haji Wazir “is a non-US citizen who was captured abroad and, at all relevant times, detained abroad” leaves him without habeas corpus rights under the US constitution. According to the government neither “the lack of proximity between the alleged site of his capture and the place of his detention”, nor “the character of the location” where he was captured alters this.<sup>112</sup> The new US administration must reject such arguments. The US lawyers representing Haji Wazir argue that

“whatever investigation led to his abduction in Dubai obviously did not take place in a ‘theater of war’ any more than Mr Wazir’s arrest took place amidst enemy gunfire. His captors neither stormed nor held any combatant position and he neither took up arms nor resisted his arrest. Acting on information whose veracity has yet to be tested or even openly alleged, US Government officers snatched him from his business in Dubai, a peaceable US ally, and then rendered him, via

undisclosed locations, to Bagram. **Withholding all due process protections from Mr Wazir is an exercise in arbitrary discretion, and his torture, interrogation, and seemingly unending detention a violation of his fundamental human rights to personal freedom and human dignity. To permit his continued detention without review would mean that the United States could pick up anyone, from any country around the world and escape scrutiny merely by sequestering that person in a foreign military base**.”<sup>113</sup>

**In October 2008, the US administration argued that the Bagram detainees have no rights under international treaty or customary law that can be judicially enforced.** For example, citing US legal precedent, it argued that unless a treaty is “self-executing”, that is, requires no implementing legislation to make its provisions judicially enforceable, US law was “settled that a treaty is primarily a compact between independent nations”, and that violations of the treaty become a matter for international negotiation in which the courts have no role. The ICCPR, the administration argued, was not self-executing. Moreover, it argued that under the MCA, “no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or civil action or proceeding to which the United States... is a party as a source of rights in any court of the United States.”<sup>114</sup>

**The Bush administration was thus making a last-ditch attempt to achieve in the case of the Bagram detentions what it failed to achieve in the case of its Guantánamo detention regime – a legal black hole of unchecked executive control over detainees.**

### RECENT COURT RULINGS AND BAGRAM SET A LEGAL PRECEDENT FOR OPENING MORE SECRET PRISONS.

**EPSTEIN, 2010**, JAMES PARKER HALL DISTINGUISHED SERVICE PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL [RICHARD, “A CONSTITUTIONAL PARODY ON HABEAS CORPUS,” THE LIBERTARIAN, JUNE 1, [HTTP://WWW.FORBES.COM/2010/06/01/GLOBAL-ALIENS-OVERSEAS-POLITICS-OPINIONS-COLUMNISTS-RICHARD-A-EPSTEIN\\_PRINT.HTML](http://www.forbes.com/2010/06/01/global-aliens-overseas-politics-opinions-columnists-richard-a-epstein_print.html)]

**The rules for detaining aliens captured overseas have long posed difficult choices for government officials and courts alike. Does the public interest in national security allow the United States to**



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detain these individuals indefinitely, either within or outside the country? Or do these suspects have the right to challenge the legality of their detention by habeas corpus?

Al-Maqaleh v. Gates is the latest chapter in this debate. In late May a panel for the Circuit Court of the District of Columbia--consisting of David Sentelle, a Reagan appointee; Harry Edwards, a Carter appointee; and David Tatel, a Clinton appointee--took another wrong turn in the road. Their unanimous decision held that three persons taken captive outside the U.S. and detained for over seven years at the United States' Bagram Air Force Base in Afghanistan could not challenge the legality of their detention in federal district court. The key fact: By conscious design, none of these three individuals have ever been allowed to set foot in the United States proper or even in Guantánamo Bay.

In 2003 the Bush Administration made a status determination that three individuals--Fadi Al-Maqaleh, Redha Al-Najar and Amin Al-Bakri--could be held indefinitely in Bagram Air Force Base in Afghanistan as enemy combatants. Those determinations were made using porous procedures that admittedly would flunk constitutional scrutiny if deployed against aliens held at Guantánamo Bay. After the 2008 election the Obama Administration defended successfully the misguided policies of the Bush Administration. In a bitter irony, the winning argument was made by Deputy Solicitor General (now acting Solicitor General) Neal Katyal, whose feverish work as the detainee's lawyer in Hamdan v. Rumsfeld had blocked an earlier unwise expansion of executive power over aliens held in Guantánamo. (I worked with Katyal on that case.)

Al-Maqaleh [v. Gates] sets a dangerous precedent that encourages the worst form of strategic behavior by U.S. government officials. Kiss the government's constitutional troubles goodbye by holding in Bagram all aliens captured outside U.S. territory. The correct constitutional interpretation does not tolerate that easy evasion. It removes all fancy distinctions. All persons, citizen or alien, whether held at home or abroad, get uniform constitutional protections. The government cannot defeat any constitutional guarantee by rerouting its planes from Guantánamo to Bagram.

The current constitutional quagmire started innocently enough in the 1950 Supreme Court decision in Johnson v. Eisentrager. There Justice Robert Jackson held that German nationals captured in China at the end World War II and shipped thereafter to German prisons were not entitled to habeas corpus. Jackson made that decision knowing that these prisoners had been tried before a military tribunal, which granted them rights to counsel, to introduce evidence and to cross-examine hostile witnesses--procedures that in most circumstances meet the minimum conditions for due process, even in cases involving American citizens. But here's the rub: Jackson unwisely allowed truncated military procedures in part because of the supposed logistical difficulties in overseeing actions taken overseas. American citizens captured and held overseas under identical services could have gotten habeas corpus.

The two drivers in Eisentrager were the citizenship of the detainee and the location of his apprehension and detention. As a textual matter, citizenship plays no constitutional role when freedom from incarceration is at stake. First the Fifth Amendment provides that no person may be deprived of his liberty without due process of law. "Person" is used in express opposition to "citizen," and necessarily embraces aliens. Citizens of course have unique rights of political participation and economic liberties. Not so for incarceration, an interest of a deeper dye.

Next, the constitution says that habeas corpus may not be suspended "unless when in Cases of Rebellion or Invasion the public safety may require it." Neither citizenship nor location is relevant to that clause, which, unhappily, never addresses the antecedent question of when habeas corpus is available in the first place. As a matter of common practice, enemy combatants taken captive on the field of battle do not get habeas corpus no matter where they are held. Think of German soldiers held in the U.S. during World War II.

The post-9/11 habeas corpus cases have perpetuated Eisentrager's original classification errors even as they clipped the government's wings. In 2004 Rasul v. Bush treated Guantánamo Bay as U.S. territory for habeas corpus purposes, given our strong perpetual treaty rights over the base. In 2006 Katyal persuaded the Supreme Court in Hamdan that Congressional passage of the Detainee Treatment Act of 2005 did not strip the federal district courts of habeas corpus jurisdiction over alien detainees held at Guantánamo Bay. And finally in 2008 Boumediene v. Bush held that the Military Commissions Act of 2006 did not offer adequate procedural protections for aliens detained at Guantánamo Bay. Boumediene's protective rationale was defective because it did not extend to aliens deliberately held outside United States territory. The circuit court in Al-Maqaleh seized on that gap when it insisted that the risks of holding prisoners at Bagram precluded habeas corpus. Its point is both naive and shameful. As Judge John Bates noted in his careful district court opinion, the practice of sending prisoners apprehended in Thailand, Tunisia, Pakistan and Dubai to Bagram was not driven by battlefield necessities. The decisions were all of the "Executive's own choosing." Any of these men could have been detained at Guantánamo Bay with greater ease and security. It is inexplicable why these self-inflicted "practical obstacles" could strip anyone of the right to habeas corpus.

Al-Maqaleh raises the moral hazard to a new level. If any of these individuals were caught on the battlefield, the government need only point that out if the detention is challenged. If taken elsewhere, the government need not prove its case beyond a reasonable doubt. At most, it should be required to indicate some probable cause for the detention. Nor should the government shrink from that burden. Granting habeas corpus and winning on it helps legitimate government detentions to skeptical parties both at home and abroad.

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Flying aliens to Bagram does neither. The Supreme Court has overruled the District of Columbia Circuit court before. It needs to do so again.

## **Detention Without Charge Violates International Law**

### **HOLDING DETAINEES WITHOUT CHARGE COLLAPSES THE GENEVA CONVENTION AND SPILLOVER TO ALL OTHER HUMAN RIGHTS AGREEMENTS.**

**Sovacool**, Graduate Teaching Assistant In Religious Studies At Virginia Tech, **2004**

(Benjamin, “Detentions, Iraq Impede The War On Terror,” Roanoke Times & World News, 3/30, L/N)

The first consequence of refusing to charge and try suspects in the war against terror is that it weakens the importance of conventions like the United Nations declaration on human rights and the Geneva Convention. For the United States, eroding human rights protections creates the risk that American soldiers could be captured and tortured outside the protection of international norms and increases the chances that terrorist organizations could begin targeting U.S. citizens as combatants.

For the world, these conventions are important international agreements that allow the global community to condemn human rights violations, such as the oppression of women in Yemen and ethnic cleansing in Rwanda and Kosovo.

## **Detention Without Charge Violates Key Liberty Interests**

### **A KEY PROTECTION OF LIBERTY IS THE REQUIREMENT THAT THE GOVERNMENT JUSTIFY DETENTION**

Richard Leone, *THE WAR ON OUR FREEDOMS*, 2002, p. 63

A cardinal protection of liberty in this country,” the *Washington Post* said in one of a remarkable series of editorials on the *Hamdi* case, is the requirement that the government justify deprivations of freedom. Yet the emerging hallmark of the enemy combatant cases is the unwillingness of the government to do precisely that. In Hamdi’s case, the Justice Department initially argued that its designation was unreviewable by any court. Even now the government contends that the courts should rightly look beyond the sketchiest of evidentiary statements it has offered in justifying its view of Hamdi. . . . It is critical that Judges remember how the doctrine they are creating could be used against people other than the ones whose cases they are currently seeing. The government’s case against Hamdi may be solid. But if it is allowed to detain him without some procedure that requires a persuasive showing, it will create a rule that allows Americans to be exempted from the protections of the Bill of Rights on the strength of a two-page statement the government condescends to present in court.

### **IF THE EXECUTIVE RETAINS THE AUTHORITY TO DETAIN INDEFINITELY, THERE IS NO FREEDOM**

Philip Heyman, *Political Scientist, MIT, TERRORISM, FREEDOM, AND SECURITY*, 2003, p. 91

Quite simply, a country cannot be free if the Executive retains the power, on its own determination that certain conditions are met, to detain citizens for an indefinite period. In both the case of citizens and the case of aliens there was an explicit effort to deny judicial review of the crucial findings on the basis of which it was claimed that the individual could be detained indefinitely

## **Habeas Corpus Fundamental to Justice**

### **HABEAS CORPUS IS FUNDAMENTAL TO A SYSTEM OF JUSTICE AND LIBERTY**

Jeremy Waldron, Law Professor-NYU School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 171

The best example, I think, is given by the habeas corpus statutes. The importance of “the Great Writ” is not exhausted by what it does in itself, overwhelmingly important though that is. Habeas Corpus is also archetypal of our legal tradition’s emphasis on liberty and freedom from physical confinement. It is also archetypal of the law’s opposition to arbitrariness in regard to actions that have an impact on that right...

## **Habeas Corpus Fundamental to All Freedom**

### **HABEAS WRIT IS THE BULWARK OF ALL FREEDOMS**

**Dunham, Federal Public Defender for the Eastern District of Virginia, Spring, 2005** [Frank W., Jr., “The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law \*: Where Moussaoui Meets Hamdi,”

Military Law Review, l/n]

During the Civil War, President Abraham Lincoln engaged in probably the greatest civil liberty infringements in our history. He suspended the writ of habeas corpus eight times in various locations within the United States and twice throughout the whole country.

The privilege to petition a court for a writ of habeas corpus to seek relief from illegal executive detention is at the heart of a case I will be discussing with you and is perhaps our most important freedom.

The modern writ of habeas corpus is traced back to England and a case arising in 1627, called Darnell's Case, or the case of the five knights. n15 The King of England at the time, Charles I, had detained five noblemen, throwing them into the castle's dungeon deep, for failing to support England's war against France and Spain. The men filed suit, asking to be brought to court for an explanation from the King for the detentions. The King refused, saying that the men were detained by the King's command--national security, so to speak, in jolly old England. The court denied relief, stating that it had no power to require the King to explain the basis for the detention. n16 It must have been good to be King. The decision provoked widespread outrage, and the following year the Parliament responded by enacting the petition of right, often referred to as "the Great Writ," basically prohibiting imprisonment without formal charges.

The Great Writ was codified in the first Habeas Corpus Act of 1641, which required an explanation from the king for detentions. n17 These rights were expanded by the Habeas Corpus Act of 1679, which required charges to be brought within a specific time period for anyone detained [\*155] for criminal acts. n18 This tradition was incorporated into the U.S. Constitution, in Article I, Section 9, often referred to as the suspension clause, because it permits suspension of the right to petition for a writ of habeas corpus only in times of invasion or rebellion. n19

Alexander Hamilton viewed the right to petition for a writ of habeas corpus as the bulwark of all freedoms because it required that all detentions be supported by law. n20 Indeed, many felt that there was no need for a Bill of Rights, because the right to the Great Writ would protect all other rights from any tyrant who would seek to violate them.

### **HABEAS CORPUS IS KEY TO ALL OTHER RIGHTS—NO WAY TO INVOKE THEM IF YOU ARE IN A SECRET PRISON**

**DUNHAM, FEDERAL PUBLIC DEFENDER FOR THE EASTERN DISTRICT OF VIRGINIA, SPRING, 2005** [FRANK W., JR., “THE THIRTY-SECOND KENNETH J. HODSON LECTURE ON CRIMINAL LAW \*: WHERE MOUSSAOUI MEETS HAMDI,” MILITARY LAW REVIEW, L/N]

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## **Habeas Corpus Key to Separation of Powers**

### **HABEAS CORPUS WRIT CRITICAL TO MAINTAIN SEPARATION OF POWERS**

Marjorie Cohn, Law Professor-Thomas Jefferson School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 361

Thus, Kennedy observed, “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.” Indeed, habeas corpus was one of the few individual rights the Founding Fathers wrote into the original Constitution, years before they enacted the Bill of Rights.

“The test for determining the scope of [the habeas corpus] provision,” Kennedy wrote, “must not be subject to manipulation by those whose power it is designed to restrain.” It was a Republican-controlled Congress, working hand-in-glove with Bush that tried to strip habeas corpus rights from the Guantanamo detainees in the Military Commission Act. The Supreme Court has determined that effort to be unconstitutional. Fulfilling its constitutional duty to check and balance the other two branches, the Court has carried out its mandate to interpret the Constitution and say “what the law is.”

### **HABEAS CORPUS VITAL TO SEPARATION OF POWERS**

Marjorie Cohn, Law Professor-Thomas Jefferson School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 364

In *Boumediene*, Kennedy quoted Alexander Hamilton, who wrote in Federalist No. 84 that “arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”

“The laws and Constitution are designed to survive, and remain in force, in extraordinary times,” Kennedy wrote: “Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.” Kennedy further elaborated:

“Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.... Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.

### **COURT CHECKS EXECUTIVE BY EXTENDING HABEAS CORPUS PROTECTIONS**

Robert J. Pushaw, Jr., Law Professor-Pepperdine, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 367

*Hamdi, Rasul, Hamdan, and Boumediene* depart from the Court’s usual approach of deferring to the president’s exercise of war powers. Instead, they fall within a minority of cases in which the Court has checked a politically weak and unpopular president who persisted in exercising war powers aggressively and in disregard of individual constitutional rights, even though such tough medicine struck the justices as unnecessary because the military emergency had passed.

## **US Detention Policies Undermine Anti-Terrorism Policy**

### **U.S. UNILATERALISM AGAINST RIGHTS TREATIES ON THE WAR ON TERROR IS HURTING COOPERATION WITH THE U.S.**

**Wu**, Interim Associate Dean And Associate Professor Of Law At Texas Southern University, 2004 (Edieth, "Global Responses And Recourses To Terrorism," Whittier Law Review, Spring, L/N)  
U.S. allies are concerned about Washington's commitment, or lack thereof, to international cooperation. 241 They fear that "Bush is now actively seeking to replace six decades of a flawed but workable system of treaties, conventions, and other global rule making procedures with American realpolitik and diktat" and to abandon the international community. 242 The United States has received international co-operation but "cooperation with America has its limits." 243 In one instance, British courts frustrated U.S. efforts by [\*552] failing to extradite Lotfi Raissi, a man whom the U.S. government claimed trained the September hijackers. 244 The British court found no evidence of his involvement and set him free. 245

### **U.S. DETENTION OF UNCHARGED PERSONS IN GUANTANAMO IS A REJECTION OF INTERNATIONAL LAW THAT IS CAUSING BACKLASH AND TERRORISM.**

**Wu**, Interim Associate Dean And Associate Professor Of Law At Texas Southern University, 2004 (Edieth, "Global Responses And Recourses To Terrorism," Whittier Law Review, Spring, L/N)  
U.S. approaches to civil liberties are being called into question around the globe. The Guantanamo center, "Camp X-Ray," has caused international concern about how the detainees are being treated. 309 Assertions of sensory deprivation and inhumane treatment have been leveled against the United States. 310 Human Rights Watch takes the position that, " as a party to the Geneva Convention, the U.S. is required to treat every detained combatant humanely, including [\*560] unlawful combatants. The U.S. government cannot pick and choose among the detainees to decide who is entitled to decent treatment." 311 Several human rights groups have weighed in on how the government is treating the new classes of individuals being detained. The American Civil Liberties Union (ACLU) expressed great concern about "President Bush's executive order allowing special military tribunals to try non-citizens [who are] charged with terrorism ... including lawful permanent residents." 312 The ACLU indicates that the Administration is being allowed to avoid the "checks and balances that are ... central to our democracy." 313 The U.S. position is oxymoronic given its continued protest about the use of international tribunals against U.S. citizens abroad. 314 In the U.S. State Department's annual Country Reports on Human Rights Practices, which evaluates each country's processes for guarantying "fair public trials," the department articulated concerns about Burma, China, Colombia, Egypt, Krygszstan, Malaysia, Nigeria, Peru, Russia, Sudan and Turkey. 315 The U.S. said that most countries did not meet the internationally accepted standards of openness, fairness and due process. 316 The refusal to participate in the ICC by President Bush moves the U.S. into blind circumvention of the Bill of Rights and its long time position concerning other countries' use of military tribunals. 317  
The U.S. rejection of multilateral regimes shows the world that Washington is "shortsightedly dismissing ... its partners' national interests" that are, of course, inextricably "embedded in multilateralism." 318 In light of recent U.S. action to fight terrorism, a [\*561] balanced approach to U.S. foreign policy must be undertaken "if ... [Bush] is to stave off criticism that he is simply writing a new law for the jungle" to protect Americans only. 319 As suggested, the United States must "encourage the weak and afflicted to take their grievances to the United Nations, the World Court and the ... [ICC]," which means that the U.S. government "must abide by UN, and World decisions" as well. 320 U.S. foreign policy must be a policy that encompasses total engagement with the world and not one that tries to "dominate it with dollars, cruise missiles, diplomacy, and secret military courts." 321 Most of all, questionable expansive readings of established U.S. domestic law should be avoided.

### **HARD POWER CANNOT DEFEAT TERRORISM; SOFT POWER IS CRUCIAL.**

#### **Federal News Service, 2004**

("Council On Foreign Relations Policy Discussion," Moderator: Richard Haass, Cfr President; Panel: Ben Steel (Sp), Cfr; Graham Allison, Harvard University; **Joseph Nye, Harvard University**; Elizabeth Economy, Cfr; Alex Jones, Harvard University, 7/28, L/N

MR. NYE: Well, what I would say would be an echo of the advice that the CIA gave to President Bush four years ago. Top of the list has to be dealing with terrorism and weapons of mass destruction. That's a clear and present danger. Second on the list I would put the revival of American reputation in the world, and a variety of things that I've mentioned about how you would go about doing this, because frankly, while hard power is crucial for dealing with the struggle against terrorism, it's not sufficient. We're never going to be able to kill and deter enough people to defeat terrorism. We have to win the hearts and minds of the moderate majority. And that, I think, was made very clear in the 9/11 commission. So essentially that wasn't on the original list that the CIA put there for Bush, but he has put it there.

### **DETENTION AND TREATMENT OF TERROR SUSPECTS HAS DAMAGED THE LEGITIMACY OF THE US**



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David **Welsh, JD, Phd Student**, March, **2011**, University of New Hampshire Law Review, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy,” p. 262-3

Although a variety of political, economic, and security policies have negatively impacted the perceived legitimacy of the United States, one of the most damaging has been the detention, treatment, and trial (or in many cases the lack thereof) of suspected terrorists. While many scholars have raised constitutional questions about the legality of U.S. detention procedures, this article offers a psychological perspective of legitimacy in the context of detention.

#### **PERCEPTION OF LEGITIMACY VITAL TO PREVENTING TERRORISM**

David **Welsh, JD, Phd Student**, March, **2011**, University of New Hampshire Law Review, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy,” p. 269-70

IV. Legitimacy: The Critical Missing Element in the War on Terror

In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient. Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law. Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate. Terrorism is primarily an ideological war that cannot be won by technology that is more sophisticated or increased military force. While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect."

## **US Detention Policies Undermine Human Rights Credibility**

### **THE SCANDAL AT GUANTANAMO BAY IS HURTING U.S. CREDIBILITY ON HUMAN RIGHTS.**

**Sovacool**, Graduate Teaching Assistant In Religious Studies At Virginia Tech, **2004**  
(Benjamin, “Detentions, Iraq Impede The War On Terror,” Roanoke Times & World News, 3/30, L/N)  
An even more nefarious impact to imprisoning suspects at Guantanamo Bay could be its effect on the ability of the United States to promote international human rights. This type of credibility is needed to persuade other countries to join American lead coalitions against genocide, rape, torture, unlawful executions and, ironically, terrorism. The United States has already had difficulty convincing France and Germany to extradite suspected terrorists to the America.

### **A STRONG INTERNATIONAL HUMAN RIGHTS REGIME LED BY THE UNITED STATES IS KEY TO HUMAN SURVIVAL BECAUSE ONLY A RIGHTS FRAMEWORK CAN ADDRESS THE WORLD’S PROBLEMS.**

**Copelon**, Professor Of Law And Director Of The International Women’s Human Rights Law Clinic At The City University Of New York School Of Law, **1999**, (Rhonda, “The Indivisible Framework Of International Human Rights,” New York City Law Review, 1998/1999, L/N)  
The indivisible human rights framework survived the Cold War despite U.S. machinations to truncate it in the international arena. The framework is there to shatter the myth of the superiority [\*72] of the U.S. version of rights, to rebuild popular expectations, and to help develop a culture and jurisprudence of indivisible human rights. Indeed, in the face of systemic inequality and crushing poverty, violence by official and private actors, globalization of the market economy, and military and environmental depredation, the human rights framework is gaining new force and new dimensions. It is being broadened today by the movements of people in different parts of the world, particularly in the Southern Hemisphere and significantly of women, who understand the protection of human rights as a matter of individual and collective human survival and betterment. Also emerging is a notion of third-generation rights, encompassing collective rights that cannot be solved on a state-by-state basis and that call for new mechanisms of accountability, particularly affecting Northern countries. The emerging rights include human-centered sustainable development, environmental protection, peace, and security. 38 Given the poverty and inequality in the United States as well as our role in the world, it is imperative that we bring the human rights framework to bear on both domestic and foreign policy.

## **US Detention Policies Globally Modeled**

### **US ACTION IS MODELED**

**Ottawa Citizen**, February 8, 2004 [“How anti-terror laws let countries justify violating human rights,” l/n] It seemed to imply that human rights violations that are part of Washington's war on terrorism didn't really count. It also implied that the U.S. might condone repression by foreign governments to further its own interests.

Since Sept. 11, 2001, the war on terror has rippled around the globe. In liberal democracies, new laws have given police wider authority, and affected traditional civil rights, like the right to silence and due process of the law. In countries with little or no democratic tradition, rulers have used anti-terrorism to crack down on their enemies -- and claimed that in so doing, they were only following the American example.

In the year following the Sept. 11 attacks, about 40 nations passed or drafted anti-terrorist legislation, according to Amnesty International.

## **AT: “Administrative and Financial Costs Justify Restricting Habeas Corpus Protections”**

### **COSTS NOT A LEGITIMATE REASON TO DENY HABEAS PROTECTION**

**Justice Kennedy- Majority Opinion *Boumediene v. Bush*, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 386-7

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas Corpus proceedings may require expenditure of funds by the government may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control of the United States asserts over the base, none are apparent to us.

**\*Answer to Negative Justifications\***

## **AT: “National Security Trumps Civil Liberty”**

### **TRADEOFF BETWEEN NATIONAL SECURITY AND LIBERTY IS FALSE**

Marjorie Cohn, Law Professor-Thomas Jefferson School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 69

Framing the discussion as a tradeoff between civil liberties and security creates a false distinction. This discourse is not new in the United States. Benjamin Franklin warned, “They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.” Throughout our history, we have grappled with this apparent tension.

Unfortunately, all too often, we have lost our liberties—with no tangible benefit. It has been primarily the executive branch that has overreached beyond the lines that separate our three branches of government. Under the guise of his “Global War on Terror,” former president George W. Bush arrogated to himself a level of presidential authority that violated the Constitution and made us less safe.

## **AT: “Due Process Undermines Efforts to Combat Terrorism”**

### **EXTENDING DUE PROCESS TO TERROR SUSPECTS IMPROVES INTELLIGENCE AND EFFORTS TO COMBAT TERRORISM**

Richard M. Pious, **Barnard College, 2006**, The War on Terrorism and the Rule of Law, p. 13

A good case can be made for the idea that protecting due process rights is actually *necessary* to maximize intelligence about terrorism. Why? Because due process of law works within an adversarial system. A prisoner's counsel from start to finish will develop a case and in doing so will gather documentation, organize the testimony of the accused, and obtain testimony of witnesses. The defendant or his or her family and friends will have to find the money to pay for legal assistance, and that behavior can provide the government with some insights. Counsel may well advise the client to plead to a lesser crime, turn state's evidence, and cooperate for leniency. Whether a trial occurs or a plea bargain is struck, the government will benefit from all the evidence and argumentation developed by defendant's counsel, therefore obtaining new intelligence not just through its own efforts but also through the efforts of defendant's counsel to mount a defense. The information brought out during a trial may be of considerable use to the government, providing it with leads to witnesses or other members of a terrorist network and enabling the government to better understand the nature of the threat.

Due process of law protects the innocent, and that too has a bearing on reaching the possibility frontier in combating terrorists. When innocent people are set free, the government no longer has to divert resources to combat nonexistent terrorist threats, and it can more efficiently target its efforts.

### **FAILURE TO RESPECT HUMAN RIGHTS MAKES TERRORISM INEVITABLE.**

Wu, Interim Associate Dean And Associate Professor Of Law At Texas Southern University, **2004**

(Edieth, “Global Responses And Recourses To Terrorism,” Whittier Law Review, Spring, L/N)

Anti-terror tools are not flawless. Aid to failing countries is part of the tool kit because "its side effect - poverty reduction - [is] ... more attractive than the side effects of other anti-terror weapons." 322 Ultimately, if the War on Terrorism is to be won, internationally accepted "norms of justice" and a healthy "respect for human rights" must guide the United States and the world's approach to this increasing problem. 323 "The right responses can only be those that reflect a perpetual faith in the universality and permanence of human rights." 324

### **ASSUMPTION THAT FAILURE TO EXTEND DUE PROCESS TO SUSPECTS UNDERMINES ANTI-TERRORISM COOPERATION IS WRONG**

Stephen Schulhofer, law professor, New York University, Journal of Criminal Law & Criminology, Spring **2011**p. 367-70

In Dearborn, Michigan, which has an Arab-American community of 200,000, law enforcement has made the maintenance of good police-community relations a "major concern." In other cities, relations between Muslim-American communities and local police departments are strained. At the federal level, community outreach has not been ignored, but policy has been dominated by measures that relax procedural restraints on investigation and detention while expanding substantive criminal offenses to reach behavior with only tenuous connections to acts of violence. From the general public to many of our highest officials, it is often considered self-evident that tougher measures will pay greater dividends. In Britain, in contrast, those who lead the counterterrorism effort often stress that success depends on building community trust by adhering to traditional conceptions of due process. In short, no unified approach to counterterrorism policing has emerged. Instead, officials commonly emphasize intrusive or coercive tactics without examining their collateral costs, or focus on generating cooperative relationships with Muslim community leaders while neglecting the character of daily interactions at the grassroots. A central concern is the need to determine which approaches yield the best results in terms of security. The available empirical evidence offers stark warnings about the potentially counterproductive effects of harsh measures. A study of British counterterrorism policies in Northern Ireland found that of six high-visibility crackdown initiatives, only one had an observable deterrent effect. Two others had no statistically significant impact, while two intrusive policies were associated with significant increases in violence. The researchers hypothesized that erroneous arrests and the adoption of internment without trial contributed to this backlash by undermining the legitimacy of anti-terrorism efforts. Similarly, studies have found that perceived injustice on the part of U.S. forces in Iraq is a strong predictor of support for resistance there. That said, we cannot assume that findings from ordinary law enforcement will apply in a straightforward way to counterterrorism policing. Because terrorism is motivated by ideology rather than desire for material gain, co-religionists or members of the same ethnic community may share some ideological perspectives with those who plan acts of terror. As a result, law-abiding individuals may be reluctant to put politically radical members of their communities at risk, even when they themselves oppose violence. In addition, because al Qaeda invokes religious justifications for its goals and methods, the religiosity of law-abiding Muslims could conceivably alter the importance of procedural justice for securing their cooperation. Finally, because

links between procedural justice and willingness to comply or cooperate have not been found in all societies, recent Muslim immigrants who have lived under repressive governments could conceivably have different notions of legitimacy or its importance for cooperation. To test the links between legitimacy, procedural fairness, and cooperation in communities impacted by counterterrorism enforcement, we conducted extensive interviews and random polling of Muslim-American residents of New York City. We found little evidence that religiosity, cultural differences, or political background play a significant role in determining willingness to cooperate. The same is true for strength of identification with the Muslim community; disagreement with American government policies on Iraq, Afghanistan, and Israel; and instrumental concerns such as a belief that the police are effective. In contrast, as in the case of conventional law enforcement, we found a strong association between willingness to cooperate with anti-terrorism policing and perceptions of procedural justice.



## **AT: “Due Process Protection Compromises Intelligence Gathering Efforts”**

### **CRIMINAL JUSTICE FRAMEWORK THAT PROTECTS DUE PROCESS MORE EFFECTIVE IN GETTING INFORMATION**

Richard M. Pious, **Barnard College, 2006**, *The War on Terrorism and the Rule of Law*, p. 8-10

A different approach to terrorism is to see it as a criminal activity, which is best dealt with through cooperation with other nations in international law enforcement efforts based on the rule of law. This approach, too, relies on infiltration, surveillance, and use of databases to gain intelligence necessary to arrest conspirators, but it assumes that these activities must be authorized by the courts, which issue warrants setting forth conditions and limits on these activities. Those apprehended are dealt with through the criminal justice system with guarantees of due process of law. This approach upholds the premise—essential in criminal justice proceedings—that when a person (whether a citizen or not) is under surveillance or an investigation focuses on a suspect who may have committed a criminal act, that person must be accorded full constitutional rights to due process. These rights limit intrusions on privacy to investigations focusing on criminal acts and prevent generalized “sweeps” for information when there is no reasonable suspicion; they protect freedom of expression and association, even for groups that may be taking unpopular positions. They guarantee due process of law in criminal proceedings, as well as other human rights based on conventions to which the United States is a signatory. The assumption is that adhering to the rule of law will result in domestic and international support for the government’s efforts. These due process guarantees are particularly important when cases rely on informants and tipsters, since people with shady backgrounds and motives are likely to take advantage of opportunities to accuse others and provide false information in exchange for immunity from prosecution or a reduction in their own sentences.

## **AT: “War on Terror Good/Effective”**

### **THE WAR ON TERROR HAS UNDERMINED US LEGITIMACY AND AUTHORITY**

David Welsh, JD, PhD Student, March, 2011, University of New Hampshire Law Review, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy,” p. 262

The Global War on Terror has been ideologically framed as a struggle between the principles of freedom and democracy on the one hand and tyranny and extremism on the other. Although this war has arguably led to a short-term disruption of terrorist threats such as al-Qaeda, it has also damaged America's image both at home and abroad. Throughout the world, there is a growing consensus that America has "a lack of credibility as a fair and just world leader." The perceived legitimacy of the United States in the War on Terror is critical because terrorism is not a conventional threat that can surrender or can be defeated in the traditional sense. Instead, this battle can only be won through legitimizing the rule of law and undermining the use of terror as a means of political influence.

## **AT: “Terrorism Risk High”**

### **OSAMA’S DEATH CRUSHES AL QAEDA**

Peter Bergen, director of national security studies at the New America Foundation, May 6, 2011, [http://www.washingtonpost.com/opinions/five-myths-about-osama-bin-laden/2011/05/05/AFkG1rAG\\_story\\_1.html](http://www.washingtonpost.com/opinions/five-myths-about-osama-bin-laden/2011/05/05/AFkG1rAG_story_1.html) Washington Post. DOA: 5/6/11

Many commentators have asserted in the past week that the death of bin Laden won’t make much difference to the wider jihadist movement that he helped spawn. There is some truth to that, but balanced against this are the facts that al-Qaeda was bin Laden’s creation and he was the ultimate author of the 9/11 attacks. When new recruits joined al-Qaeda, they pledged a personal oath of religious allegiance to bin Laden, rather than to the organization.

Similarly, when affiliated jihadist groups have attached themselves to al-Qaeda central, as al-Qaeda in Iraq did in 2004, their leaders pledge their fealty to bin Laden personally.

Bin Laden is one of the few men in recent decades who truly changed the history of the world. With him gone from the scene, there is no one of his stature and charisma to become not only the leader and strategic guide of al-Qaeda, but to inspire the group’s affiliates across the Middle East and North Africa and the wider jihadi movement around the globe. For that, we can all be grateful.

### **DROWNING IN A BATHTUB IS MORE LIKELY THAN DYING IN A TERROR ATTACK**

Mueller ’05, (John, “Is There Still a Terrorist Threat?” FOREIGN AFFAIRS v. 85 n. 5, September/October)

But while keeping such potential dangers in mind, it is worth remembering that the total number of people killed since 9/11 by al Qaeda or al Qaeda-like operatives outside of Afghanistan and Iraq is not much higher than the number who drown in bathtubs in the United States in a single year, and that the lifetime chance of an American being killed by international terrorism is about one in 80,000 -- about the same chance of being killed by a comet or a meteor. Even if there were a 9/11-scale attack every three months for the next five years, the likelihood that an individual American would number among the dead would be two hundredths of a percent (or one in 5,000). Although it remains heretical to say so, the evidence so far suggests that fears of the omnipotent terrorist -- reminiscent of those inspired by images of the 20-foot-tall Japanese after Pearl Harbor or the 20-foot-tall Communists at various points in the Cold War (particularly after Sputnik) -- may have been overblown, the threat presented within the United States by al Qaeda greatly exaggerated. The massive and expensive homeland security apparatus erected since 9/11 may be persecuting some, spying on many, inconveniencing most, and taxing all to defend the United States against an enemy that scarcely exists.

### **ONLY A 1 IN 80,000 CHANCE OF BEING KILLED BY A TERRORIST**

The New Republic, December 24, 2008, p. 22

As a result of this psychological bias, large numbers of Americans have overestimated the probability of future terrorist strikes: In a poll conducted a few weeks after September 11, respondents saw a 20 percent chance that they would be personally harmed in a terrorist attack within the next year and nearly a 50 percent chance that the average American would be harmed. Those alarmist predictions, thankfully, proved to be wrong; in fact, since September 11, international terrorism has killed only a few hundred people per year around the globe, as John Mueller points out in Overblown. At the current rates, Mueller argues, the lifetime probability of any resident of the globe being killed by terrorism is just one in 80,000.

### **EVEN IF THEY HAVEN’T REJECTED ALL VIOLENCE – TERRORISTS AVOID MASS DESTRUCTION**

Mueller ’05, (John, “Is There Still a Terrorist Threat?” FOREIGN AFFAIRS v. 85 n. 5, September/October)

One reason al Qaeda and “al Qaeda types” seem not to be trying very hard to repeat 9/11 may be that that dramatic act of destruction itself proved counterproductive by massively heightening concerns about terrorism around the world. No matter how much they might disagree on other issues (most notably on the war in Iraq), there is a compelling incentive for states -- even ones such as Iran, Libya, Sudan, and Syria -- to cooperate in cracking down on al Qaeda, because they know that they could easily be among its victims. The fbi may not have uncovered much of anything within the United States since 9/11, but thousands of apparent terrorists have been rounded, or rolled, up overseas with U.S. aid and encouragement. Although some Arabs and Muslims took pleasure in the suffering inflicted on 9/11 -- Schadenfreude in German, shamateh in Arabic -- the most common response among jihadists and religious nationalists was a vehement rejection of al Qaeda’s strategy and methods. When Soviet troops invaded Afghanistan in 1979, there were calls for jihad everywhere in Arab and Muslim lands, and tens of thousands flocked to the country to fight the invaders. In stark contrast, when the U.S. military invaded in

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2001 to topple an Islamist regime, there was, as the political scientist Fawaz Gerges points out, a "deafening silence" from the Muslim world, and only a trickle of jihadists went to fight the Americans. Other jihadists publicly blamed al Qaeda for their post-9/11 problems and held the attacks to be shortsighted and hugely miscalculated. The post-9/11 willingness of governments around the world to take on international terrorists has been much reinforced and amplified by subsequent, if scattered, terrorist activity outside the United States. Thus, a terrorist bombing in Bali in 2002 galvanized the Indonesian government into action. Extensive arrests and convictions -- including of leaders who had previously enjoyed some degree of local fame and political popularity -- seem to have severely degraded the capacity of the chief jihadist group in Indonesia, Jemaah Islamiyah. After terrorists attacked Saudis in Saudi Arabia in 2003, that country, very much for self-interested reasons, became considerably more serious about dealing with domestic terrorism; it soon clamped down on radical clerics and preachers. Some rather inept terrorist bombings in Casablanca in 2003 inspired a similarly determined crackdown by Moroccan authorities. And the 2005 bombing in Jordan of a wedding at a hotel (an unbelievably stupid target for the terrorists) succeeded mainly in outraging the Jordanians: according to a Pew poll, the percentage of the population expressing a lot of confidence in bin Laden to "do the right thing" dropped from 25 percent to less than one percent after the attack.

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**\*\*\*NEGATIVE\*\*\***

## **\*General Due Process Answers\***

## **Due Process Extended Now: Generally**

### **STRONG CHECKS IN PLACE AGAINST VIOLATIONS OF CIVIL LIBERTY IN PURSUIT OF SECURITY**

Joel Rosenzweig et al, **Heritage Foundation**, September 20, **2004**, Heritage Special Report, "The Patriot Act Reader",

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=72258>, p. 23

As noted, there is little more than anecdotal evidence to support this analysis; yet it has the appeal both of common sense and consistency with contemporary experience. It appears that we have strengthened substantially our ability to examine, oversee, and correct abuses of executive power. The public is in a stronger position today than it has ever been before. And that power of oversight gives us freedom to grant the government great powers when the need arises, secure in the knowledge that we can restrain their exercise appropriately. In short, one lesson from history is that we should not be utterly unwilling to adjust our response to issues of liberty in today's crisis of terrorism - for we have the capacity to manage that adjustment and readjust it as necessary.

### **WE HAVE LEARNED FROM THE PAST NOT TO OVERREACT IN TIMES OF CRISIS**

Paul Rosenzweig, **Senior Legal Research Fellow, Heritage Foundation**, **2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 671

Indeed, by comparison with past excesses, this history should actually give us some comfort. Many who are concerned with current activities think that we are on a downward spiral towards diminished civil liberties. But a better view of this history shows that the balance between liberty and security is more like a pendulum that gets pushed off-center by significant events (such as those of September 11th) than a spiral. Over time, after Americans have recovered from the understandable human reaction to catastrophe and after the threat recedes, the pendulum returns to center.

We should acknowledge the historical reality that when the wartime crisis passes, the balance swings back in favor of freedom and liberty. And since World War II, our society has matured such that the scope of the swing in the pendulum is not nearly as great as it had been in the past. Whatever one may think of the detention of three Americans as enemy combatants, for example, there can be little disagreement that the detention of three Americans (whose detention is based upon some quantum of individualized suspicion), is sufficiently different in degree from the wholesale detention of over 100,000 Japanese-Americans (whose detention was ordered in the complete absence of any individualized suspicion) as to be different in kind. n28 To quote Chief Justice Rehnquist:

There is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. n29

## **Due Process Extended Now: Bagram Closing Down**

### **BAGRAM IS CLOSING NOW – BEING TRANSFERRED TO AFGHANI COMMAND**

**PAK TRIBUNE 2010** [“BAGRAM JAIL TRANSFER TO AFGHANISTAN IN ONE YEAR: US COMMANDER”, JAN 28TH, [HTTP://WWW.PAKTRIBUNE.COM/NEWS/INDEX.SHTML?223953](http://www.paktribune.com/news/index.shtml?223953)]

WASHINGTON: The US prison at Bagram Air Field north of Kabul will transfer to Afghan command in one year, the US commander in charge of US detention facilities in the war-torn nation said Wednesday. Vice Admiral Robert Harward said the United States aims to make the transfer as quickly as possible and according to international law.

Speaking during a telephone press conference from Kabul, Harward said the plan was to hand over the prison in one year, adding that he was optimistic about the deadline. But he said some 2,000 Afghan soldiers needed to be trained as prison guards to work in the prison before it could be transferred to Afghan authority.

**BAGRAM WILL NOT BE THE NEW GUANTANAMO – IT IS BEING HANDED OVER TO THE AFGHANIS**  
**ACKERMAN**, SENIOR REPORTER FOR THE WASHINGTON INDEPENDENT, **2010** [SPENCER, “AFGHANS TO TAKE OVER BAGRAM PRISON”, [HTTP://WASHINGTONINDEPENDENT.COM/73642/AFGHANS-TO-TAKE-OVER-BAGRAM-PRISON](http://WASHINGTONINDEPENDENT.COM/73642/AFGHANS-TO-TAKE-OVER-BAGRAM-PRISON)]

Vice Adm. Robert Harward arrived in Afghanistan this fall to take over detention operations for Gen. Stanley McChrystal.

McChrystal's explicit instructions for Harward's portfolio were to transfer control of the prison at Bagram Air Field to Afghan control. On Saturday, that instruction took a big step forward:

Afghan officials have agreed to take over the running of the US military prison at Bagram, which currently houses about 750 inmates, including around 30 foreign nationals.

A so-called Memorandum of Understanding signed on Saturday could see the controversial facility handed over to Afghan control within months, officials said.

The plan appears to be to transition Bagram first to the Afghan defense ministry and then to the justice ministry. But the shift also augurs something profound: it means that Bagram can't serve as neo-Guantanamo, as some have suggested. Daphne Eviatar reported that the influential Center for American Progress floated a proposal in November to send Guantanamo detainees to Bagram as an interim step to closing the Cuban prison. But handing Bagram over to Afghan control effectively forecloses on that option.



## Civil Liberties Should be Reserved for Citizens

### CONCEPT OF CIVIL LIBERTY ONLY HAS MEANING FOR CITIZENS

William H. Rehnquist, former Chief Justice USSC, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 43

The answer to this question will depend, in turn, on just what is meant by *civil* liberty. It is not simply “liberty” but civil liberty of which we speak. The word “civil” in turn, is derived from the Latin word *civis*, which means “citizen.” A citizen is a person owing allegiance to some organized government, and not a person in an idealized “state of nature” free from any governmental restraint. Judge Learned Hand, in remarks entitled, “The spirit of Liberty” delivered during World War II, put it this way: “A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few.”

### CITIZENS DETERMINE THE SCOPE OF RIGHTS

Fordham Urban Law Journal, April, 2002, 29 Fordham Urb. L.J. 1715, p. footnotes

n90. Id. at 3. Sunstein argues that rights are really a product of societal debate and should not be treated as a part of nature. Though nature is not a poor justification for law, it should not be viewed as the rationale for law. In other words, citizens should not be scared to change law for fear of going against nature because laws are really a product of citizens' debates and not nature. Id. Sunstein's challenge rests on the assumption that existing distributions are inherently biased: “Respect for existing distributions is neutral only if existing distributions are themselves neutral.” Id. at 6. Hence, it does not make sense to treat the status quo neutrality as superior to the laws that aim to change the status quo. Id.

### CITIZENSHIP DOES MATTER TO THE SCOPE OF DUE PROCESS PROTECTIONS

Jerome A. Barron, Professor of Law, George Washington University Law School, Notre Dame Journal of Law, Ethics & Public Policy, 2005, 19 ND J. L. Ethics & Pub Pol'y 33, p. 69

Professor Bickel wrote in 1973: “It is gratifying, therefore, that we live under a Constitution to which the concept of citizenship matters very little indeed.” n186 But in 2004, it is a disturbing idea that, in a time of war and emergency, the Constitution affords no greater measure of protection to citizens than non-citizens with respect to a restraint on liberty as serious as indefinite detention. One certainly can appreciate the egalitarian impulse behind the assertion that it is somehow distasteful to accord a greater measure of constitutional protection against repressive action by government for citizens as opposed to non-citizens. The citizen-person distinction suggests inequality. This is probably true but its truth should not be at the expense of the fact that the concept of citizenship is suffused with constitutional rights. n187 Constitutional protection in an ideal world should be accorded to all. The Court in Hamdi alternately embraced, and withdrew from, citizenship as a constitutional concept. But in Hamdi, citizenship did serve as an additional protection against arbitrary action by government. Citizenship matters.

### INDIVIDUAL RIGHTS MAKE NO SENSE WITHOUT REFERENCED TO THE COLLECTIVE AND COMMUNITARIAN STRUGGLES FROM WHICH THEY EMERGED – CITIZENSHIP SHOULD BE UNDERSTOOD IN THE SAME WAY

Jonathan Fox, Latin American Studies, U Cal Davis, 2005, American Review of Political Science, Volume 8:171-201, p. 174

Any attempt to pin down the concept of transnational citizenship raises all the contested issues that are associated with the term citizenship itself.<sup>6</sup> Some approaches are defined primarily in reference to the state, with citizenship grounded in rights that are strong enough to constitute “enforceable claims on the state” (Tilly 1998, pp. 56–57). In contrast, diverse communitarian conceptions of citizenship are grounded in membership in civic or political communities.<sup>7</sup> In other words, approaches to citizenship that depend on institutionally guaranteed rights are quite different from those defined by collective action and shared identities. These two different dimensions of citizenship can be described in shorthand as state-based and society-based. Though conceptually distinct, in practice they are interdependent. A long tradition of comparative historical-sociological analysis, associated most notably with Barrington Moore, shows how waves of collective action made individual rights possible (e.g., Tilly 1998). As Foweraker & Landman

(1997) put it, “almost paradoxically, the essentially individual rights of citizenship can only be achieved through different forms of collective struggle” (p. 1, italics in original).

### CIVIC REPUBLICAN CITIZENSHIP DISCOURSE RELIES ON EXCLUSION

Planet Debate – Due Process/Terrorism Release  
Sherry Hall

Kathleen Knight **Abowitz, Professor Department of Educational Leadership Miami University, 2003**,  
The Dominant Discourses of Citizenship in American life and Schooling,  
<http://civiced.indiana.edu/papers/2003/1052315414.doc> , p.7

Civic republican discourse habitually expresses the values of love and service to one's political community (local, state, and national); its views on civic membership in the political community are characterized by an exclusivity not seen in other citizenship discourses. Civic republican discussions highlight the need for better civic literacy and the importance of a central body of civic knowledge for good citizenship. Civic republicans wish to promote a civic identity among young people that is characterized by commitment to the political community, respect for its symbols (Citizenship Education Program 2003), and active participation in its common good. Cooperative participation in pro-government activities (voting, involvement with political parties, and civic activities) is stressed in civic republican texts.

### **CITIZENSHIP FORMS A NECESSARY PART OF A PERSON'S IDENTITY, WITHOUT IT, ONE CANNOT HAVE ANY OTHER HUMAN RIGHTS**

**Axtmann, Roland, Political theory professor, University of Aberdeen, 1997**, "Collective Identity and the Democratic Nation-State in the Age of Globalization" in *Articulating the Global and the Political: Globalization and Cultural Studies*, eds. Cvetkovich & Kellner, p. 42

Whatever the precise criteria for inclusion into the community of citizens, citizenship as a legal status is an important part of an individual's identity; as a set of practices it constitutes individuals as competent members of a community (Turner 1994). Democratic rule is exercised in the sovereign, territorially, consolidated nation-state. In a bounded territory, people's sovereignty is the basis upon which democratic decision-making takes place, and the people are the addressees or the constituents of the political decisions. The territoriality consolidated democratic polity, which is clearly demarcated from other political communities, is seen as rightly governing itself and determining its own future through the interplay of forces operating within its boundaries. Only in a sovereign state can the people's will command without being commanded by others.

### **CITIZENSHIP CONCEPT GROUNDED IN EXCLUSION**

Saskia **Sassen, Department of Sociology, University of Chicago, 2004**, The Repositioning of Citizenship: Toward New Types of Subjects and Spaces for Politics, Campbell Public Affairs Institute, April 30,  
<http://www.maxwell.syr.edu/campbell/Library%20Papers/Event%20papers/TransCitizenship/Soysal.pdf>, p. 5

Some of these issues can be illustrated through the evolution of equal citizenship over the last few decades. Equal citizenship is central to the modern institution of citizenship. The expansion of equality among citizens has shaped a good part of its evolution in the twentieth century. There is debate as to what brought about the expanded inclusions over this period, most notably the granting of the vote to women. For some (e.g., Karst 2000) it is law itself—and national law—that has been crucial in promoting recognition of exclusions and measures for their elimination. For others (Young 1990; Taylor 1992) politics and identity have been essential because they provide the sense of solidarity necessary for the further development of modern citizenship in the nation-state. Either way, insofar as equality is based on membership, citizenship status forms the basis of an exclusive politics and identity (Walzer 1985; Bosniak 1996).

### **CITIZENSHIP IS COMMONLY USED AS A MECHANISM OF EXCLUSION**

Christian **Joppke**, is Professor of Sociology at the European University Institute, July 1999  
Ethnic and Racial Studies Volume 22 Number 4, *How immigration is changing citizenship: a comparative view*, Pg. 630

Immigration is one reason why Marshallian citizenship universalism is no longer plausible today. The movement of people across states revealed that citizenship is not only a set of rights, but also a mechanism of closure that sharply demarcates the boundaries of states (see Brubaker 1992, ch. 1). As a mechanism of closure, right only of the citizens of this state; it can be denied to everyone else. Even for those who manage to enter the territory of another state, access to this state's citizenship is generally denied, and available only if demanding (residence and personal) characteristics are fulfilled, which are differently conceived in different states.

## **Due Process Protections Limited to Citizens**

### **HAMDI COURT LIMITED TO PROTECTING DUE PROCESS RIGHTS OF CITIZENS**

Marjorie Cohn, Law Professor-Thomas Jefferson School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 359

Justice O'Connor wrote for the *Hamdi* Court: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." O'Connor noted, "even the war power of the President does not remove constitutional limitations safeguarding essential liberties." O'Connor echoed a theme she has raised in prior Court decisions, which is particularly relevant today: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

### **US HAS HISTORICALLY TREATED NON-CITIZENS DIFFERENTLY FROM CITIZENS**

Dana Keith, Law Student, Florida Journal of International Law, June, 2004, 16 Fla. J. Int'l L. 405, p. 417

Beginning in the 1950s and lasting through the 1980s, the legal structure governing the detention of noncitizens was relatively clear and understood. First, a critical distinction was made between resident noncitizens who had obtained entry into the United States, but who had yet to qualify for naturalization (including both legal and illegal resident noncitizens), and excludable noncitizens who had been detained at the border (including noncitizens who had been paroled into the United States). n41 If a noncitizen was deemed excludable, and thus was stopped at the port of entry, the individual could be detained indefinitely. n42 Conversely, if the noncitizen was found deportable, meaning that the noncitizen had already procured entry into the United States, he could only be held for six months. n43 This distinction was extremely important because at that time it was widely held that the U.S. Constitution afforded greater rights to noncitizens already in the United States than to those who had only just arrived at the border. n44 After the expiration of this six-month period, the deportable noncitizen could be released. n45 The release of the noncitizen, however, was often conditioned on certain supervision and reporting requirements. n46

### **CITIZEN/NON-CITIZEN DISTINCTION NOT UNIQUE**

Harvey Rishikof, Law Student, Suffolk Journal of Trial & Appellate Advocacy, 2003, 8 Suffolk J. Trial & App. Adv. 1, p. 19

The deeply enshrined principle that the Supreme Court reads the Constitution differently for citizens, non-citizens, and military personnel (even in war) was established by Duncan v. Kahanamoku. n86 In Duncan, despite an Act of Congress authorizing the President and the Governor of Hawaii to declare martial law, the Supreme Court required the issuance of the writs of habeas corpus for a military trial of civilians accused of embezzlement of civilian funds and brawling with two Marine sentries. n87 Even under the declared martial law then in effect for Hawaii, the Court reinvigorated the principle stemming from the Civil War and *Ex parte Mulligan* - that martial law can not exist when civilian courts are open. n88 For such sweeping military jurisdiction, Congress would have to clearly act and find that "such great and imminent public danger exists" as to justify the authorization of military tribunals. n89 This constitutional need for congressional action was reinforced by Justice Jackson's view in *Youngstown* that the President is not an "absolute" power even in a military context. n90 In Justice Jackson's widely accepted formulation, the President's power is the most legitimate when it is enacted pursuant to an expressed or implied authorization by the Congress. In the face of silence by the Congress, presidential action is less legitimate and presidential authority is at its nadir when the actions taken are incompatible with the expressed or implied will of the Congress. Although there is a sense of a "crisis constitution" that envisions legitimate presidential action to restrict core rights in an emergency, for the congressional school it is constitutionally significant that even President Lincoln, after unilaterally suspending the writ of habeas corpus, went back to Congress for (and obtained) retroactive approval for his exercise of such power. n91

## **Non-Citizen Terror Suspects Don't Require the Same Due Process Protections**

### **EXTENDING DUE PROCESS PROTECTIONS DOESN'T REQUIRE THAT THEY BE EXACTLY THE SAME**

M. Katherine B. Darmer, **Law Professor, Chapman University, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 217

The juxtaposition of the Court's recent *Miranda* and due process jurisprudence might lead to the bizarre result that unreliable confessions extracted by foreign agents using brute force would be admissible as evidence in American courts, whereas reliable and voluntary confessions taken by US agents who failed to give *Miranda* warnings would be inadmissible. Whether *Miranda* warnings were given should not be the *sine qua non* for the admissibility of statements made in response to foreign interrogation, however. Rather the Court should focus on the historic concern for reliability and have a healthy regard for the demands of national security in this context.

## **Rule of Law Applies Protections to Citizens Differently**

### **RULE OF LAW DESIGNED TO DISTINGUISH BETWEEN CULTURES**

Robin West, Professor of Law, Georgetown University Law Center, 2000 (QUINNAPAC LAW REVIEW, Is the Rule of Law Cosmopolitan? , p. 259)

This traditional account of the rule of precedent, of legal justice and the rule of law, is not simply non-cosmopolitan; it is anti-cosmopolitan. The very point of precedent, and of law, so understood, is to forge a cultural or national identity separate and distinct from undifferentiated humanity; it is to create and maintain bonds of civic obligation distinctively grounded in particularistic tradition rather than in universal essence. We treat likes alike - masters like masters, servants like servants, one promise backed by consideration like another promise backed by consideration - because by doing so we create, affirm and differentiate particular and shared identities, and by doing so, we create, affirm and differentiate our culture from all others. We do all of this, in part, through law. Law should be valued, then, not only and not primarily because it handily insures order, safety, a less brutal, longer, and possibly freer life for all, but precisely because it wards off the danger of a creeping cosmopolitan universalism - a universalism that threatens our national identity, and hence our human and cultural identity, profoundly.

## **Civilian Trials for Terror Suspects Bad**

### **TRYING TERRORISTS IN CIVILIAN COURTS MAKES IT MORE DIFFICULT TO CONVICT THEM**

Ashley **Pope, JD**, **Fordham International Law Journal**, February 2011, “After Guantanamo: Legal Rights of Foreign Entities Held in United States War on Terror,” p. 532

Detention by law enforcement authorities in the United States and subsequent criminal trial in the civilian justice system bring more stringent procedural protections than military commissions do: (1) arrests require probable cause; (2) those arrested on criminal charges must be read their Miranda rights; (3) the prosecution may not use any statements made by the suspect during interrogation if the suspect was not apprised of his or her rights; (4) the Federal Rules of Evidence exclude hearsay statements unless they fit within narrow exceptions; (5) in order for evidence to be admitted, it must be authenticated or identified; and (6) convictions require proof beyond a reasonable doubt. While these guarantees provide a detainee with more rights, they may also create problems for the government when trying the detainee. For example, evidence gained through the use of enhanced interrogation techniques would likely be excluded. President Obama has prohibited the use of such techniques, but many of the Guantanamo detainees were subjected to them before this prohibition. Any confessions obtained through the use of enhanced interrogation techniques would create evidentiary problems in a federal courtroom.

### **TRIAL COURTS FORCE CLASSIFIED INFORMATION TO BE REVEALED**

Tung **Yin**, **law professor**, **Lewis & Clark**, **Harvard Journal of Law & Public Policy**, Spring 2011, “PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,” p. 470

The question of what to do with captured high-level al Qaeda leaders, such as suspected 9/11 mastermind Khalid Sheikh Mohammed, has vexed both the Bush and Obama Administrations. For those who believe that terrorists must be delegitimized and denied status as combatants, the appropriate course of action would be criminal prosecution. On the other hand, for those who want to exact lawful retribution, but fear that federal court trials will compromise national security by revealing classified information, the appropriate course of action might be prosecution in a military court.

### **CRIMINAL TRIALS POSE RISKS TO ANTI-TERRORISM**

Louis **Klarevas**, **City University of NY**, 2004, [Harvard International Review, Fall, pg. 18-23]

First, the "due process" model fails fully to take into account the magnitude of the challenge involved in convicting terrorists as criminals by demonstrating culpability beyond a reasonable doubt. The obstacles include not only the risk to the prosecution of revealing sources and methods, which is likely to be much greater than in an ordinary criminal trial, but also the limitations imposed by criminal law on means of obtaining evidence. Means commonly employed overseas in covert operations, unauthorized wiretaps, for example, may render their fruits inadmissible in domestic criminal proceedings. Moreover, prosecutors are likely to find it difficult to persuade witnesses to come forward to testify, given the heightened danger of retaliation.

## **Due Process Protections for Foreign Terror Suspects Bad**

### **FOREIGN TERROR SUSPECTS SHOULD NOT BE GIVEN MIRANDA WARNINGS**

Ashley **Pope, JD**, Fordham International Law Journal, February 2011, "After Guantanamo: Legal Rights of Foreign Entities Held in United States War on Terror," p. 546-7

Because the "war on terror" is likely to continue both before and after the closure of the detention facilities at Guantanamo, it is also necessary to address the question of how to detain and try foreign nationals suspected of terrorism on US soil going forward.

On US soil, initially, military detention of a foreign national suspected to be a terrorist may provide the better option for addressing the sensitive security and procedural concerns unique to the "war-on-terror" context and may better address intelligence-gathering needs, assuming the detention is the result of an imminent or immediately thwarted attack. Terrorist attacks are often the result of planning and coordination, and, as seen in the controversy surrounding the questioning of Abdulmutallab, it is important to get information about co-conspirators in order to prevent subsequent harm. The Miranda warnings required in the civilian system can cause a suspect to "go silent." While Miranda rights are a tenet of the American criminal justice system, the war-like context of terrorism, even on American soil, cannot be ignored. Less immediate threats can be addressed in the civilian criminal justice system. <sup>2</sup>

### **TERRORISTS SHOULD BE TREATED AS ENEMIES OF THE HUMAN RACE – DIFFERENT SET OF RULES**

Howard **Wachtel, JD Candidate**, 2005, "Targeting Osama bin Laden: Examining Assassination as a Tool of US Foreign Policy," Duke Law Journal, 55 Duke L.J. 677, p. 704

Nevertheless, many have attempted to circumvent the applicability of EO 12,333 by drawing parallels between the historical treatment of robbers and pirates and the modern-day treatment of terrorists. Biggio, for example, asserts that terrorists should be classified as hostes humani gentis ("[enemies] of the human race"). Developed between the seventeenth and eighteenth centuries to provide justification for killing pirates, the theory of hostes humani gentis is reserved for certain heinous acts that are "so egregious" that they are "universally culpable." Two factors are relevant in determining whether a particular group is "an "enemy of the human race': the magnitude of the threat posed by the perpetrators, and the universal condemnation of the acts." Given the terrorists' desire to target civilians, coupled with the increasing availability of weapons of mass destruction, one could argue that terrorists are enemies of the human race. Like the nonstate actors of the eighteenth and nineteenth centuries, terrorists should be subject to a different set of rules. Put simply, terrorists are the new pirates.

## **Due Process Protections for Terror Suspects Increases Terrorism Risk**

### **PROTECTING CIVIL LIBERTIES RISKS TERRORISM**

Paul Rosenzweig, **Heritage Senior Legal Research Fellow, 2004**

["The Patriot Act Reader," w/ Alane Kochems & James Jay Carafano, 9/20,

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=69895>]

When assessing civil liberty questions, it is important not to lose sight of the underlying purpose of government: personal and national security. The balance between civil liberties and security is not a zero-sum game. Thus, it is vital to realize that there are significant factors weighing on both the civil liberty and national security sides of the scale. That is why, for example, the courts have recognized that in the national security context, the requirements of the Fourth Amendment apply somewhat differently than they do in the context of domestic law enforcement. Suppressing terrorism will not be achieved by military means alone. Effective law enforcement and intelligence-gathering activities are key to avoiding new terrorist attacks. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. However, September 11th changed this traditional calculus —our failure to prevent terrorism can be catastrophic.

### **RIGHT TO COUNSEL UNDERMINES INTELLIGENCE GATHERING – DEPRIVATION OF DUE PROCESS RIGHTS IS NECESSARY TO SAVE LIVES**

Thomas J. Lepri, **Law Student, Fordham Law Review**, May, 2003, 71 Fordham L. Rev. 2565, p. 2589

The most common objection to giving suspected terrorists the full constitutional protection of civilian courts hinges on the issue of secrecy. Granting suspects unfettered access to counsel may allow them to pass coded information to other operatives on the outside. According to the government, access to counsel also may "interfere with - and likely thwart - the efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, its plans, and its supporters." This logic relies on the notion that one of the main functions of counsel is to clamp down on the government's aggressive questioning of criminal suspects, and it is likely correct - that is, a competent attorney will thwart the sort of unconstitutional interrogation techniques that the government might be tempted to use against a suspect it believes has information that could save lives.

### **ACCESS TO COUNSEL UNDERMINES LEGITIMATE INTERROGATION EFFORTS – SIGNIFICANT TIME REQUIRED FOR SUCCESSFUL INTERROGATIONS**

David B. Rivkin, Jr. et al, Attorney, former Department of Justice Official, Enemy Combatant

Determinations and Judicial Review, The Federalist Society for Law and Public Policy Studies, 2004,

<http://www.fed-soc.org/Laws%20of%20war/enemycomb.pdf>, p. 15

Captured enemy combatants are lawfully subject to interrogation, in an effort to obtain information to be use in fighting the war. Permitting access to counsel, who may provide expertise but must, as an ethical matter, also assume the role of advocate, interposing him or herself between the government and the detainee, undermines the interrogation process—a carefully structured process that, ultimately, is dependent upon psychological pressure since torture is forbidden. As explained by the United States in a recent submission to the District Court in Padilla's case "The military's efforts to obtain intelligence information through interrogation rely in large part on developing and maintaining an atmosphere of trust and dependence. The objective is to produce a relationship in which the subject perceives that he is reliant on his interrogators for his basic needs and desires. Achieving that objective can take a significant amount of time... Because of the delicate nature of the relationship between the subject and his interrogators and the significant time frequently required to achieve the necessary dependence and trust, interposing counsel into the relationship—even if only for a limited duration of for a specific purpose—can irreparably damage efforts to obtain vital intelligence through interrogation. Any manner of external influence can compromise the ability to conduct effect interrogations."



## **Must Balance Civil Liberties Against National Security**

### **UNRESTRICTED CIVIL LIBERTIES DANGEROUS – MUST BALANCE WITH SECURITY NEEDS**

**Fordham International Law Journal, April, 2003**, 26 Fordham Int'l L.J. 1193, p. 1202-3

Identical sentiments, albeit expressed more elegantly, were offered earlier by the American judge, Learned Hand, while commenting on the delicate balance applicable in time of warfare. He wrote: "a society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few." n39 Thus, the argument runs, the pursuit of safety in the war against terrorism carries a price which is the temporary diminution of freedom. The increased demand for the assurance of public safety brings with it the necessary and lamented reduction in individual freedom. The interests of the many trump those of the individual. In turn, the institutions and principles that support and promote individual freedom must also be trimmed during these unusual times.

### **GOVERNMENT JOB IS TO BALANCE CIVIL RIGHTS WITH SECURITY**

Joel **Rosenzweig, Heritage Foundation**, September 20, **2004**, Heritage Special Report, "The Patriot Act Reader",

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=72258>, p. 6

When assessing civil liberty questions, it is important not to lose sight of the underlying purpose of government: personal and national security. The balance between civil liberties and security is not a zero-sum game. Thus, it is vital to realize that there are significant factors weighing on both the civil liberty and national security sides of the scale. That is why, for example, the courts have recognized that in the national security context, the requirements of the Fourth Amendment apply somewhat differently than they do in the context of domestic law enforcement.

Suppressing terrorism will not be achieved by military means alone. Effective law enforcement and intelligence-gathering activities are key to avoiding new terrorist attacks. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. However, September 11 changed this traditional calculus -our failure to prevent terrorism can be catastrophic. And so, our goal should be to minimize infringements on civil liberty while maximizing our preventative abilities.

### **CONSTITUTION MANDATES OBLIGATION OF GOVERNMENT TO PROTECT SECURITY AS WELL AS CIVIL LIBERTIES**

Paul **Rosenzweig, Senior Legal Research Fellow, Heritage Foundation**, **2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 674

While a large fraction of the debate over new law enforcement and intelligence systems focuses on perceived intrusions on civil liberties, Americans should keep in mind that the Constitution weighs heavily on both sides of the debate over national security and civil liberties. The President and Congressional policymakers must respect and defend the individual civil liberties guaranteed in the Constitution when they act, but there is also no doubt that they cannot fail to act when we face a serious threat from a foreign enemy.

The Preamble to the Constitution acknowledges that the United States government was established in part to provide for the common defense. The war powers were granted to Congress and the President with the solemn expectation that they would be used. Congress was also granted the power to "punish ... Offenses against the Law of Nations," which include the international law of war, or terrorism. n36 In addition, serving as chief executive and commander in chief, the President also has the duty to "take Care that the Laws be faithfully executed," including vigorously enforcing the national security and immigration laws.

Thus, as we assess questions of civil liberty it important that we not lose sight of the underlying end of government - personal and national security. That balance is not a zero-sum game, by any means. But it is vital that we not disregard the significant factors weighing on both sides of the scales.

### **MUST BALANCE PROTECTION OF CIVIL LIBERTIES WITH THE SEVERITY OF THE ADDRESSED THREAT**

Paul **Rosenzweig, Senior Legal Research Fellow, Heritage Foundation**, **2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 720-1

The Patriot Act has become something of a political football in the past few months. One sees television commercials of anonymous [\*721] hands ripping up the Constitution, with a voice-over blaming Attorney General Ashcroft. Print ads show an elderly

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gentleman leaving a bookstore with text decrying the use of government powers to get his book purchase list. But the hysteria is somewhat overblown.

Nobody would seriously dispute the major premise of Chief Justice Rehnquist's analysis - an analysis echoed by Judge Richard Posner: n170 in assessing the appropriateness of infringements on American liberty, we must take into account the severity of the threat being averted. In this time of terror, some adjustment of the balance between liberty and security is both necessary and appropriate. And, as the courts are likely to agree, the Constitution is sufficiently malleable and pragmatic to accommodate this balancing of interests. Indeed, the very text of the Fourth Amendment - with its prohibition only of "unreasonable" searches and seizures - explicitly recognizes the need to balance the harm averted against the extent of governmental intrusion.

### **PRAGMATICS DEMANDS BALANCING CIVIL LIBERTIES WITH SECURITY NEEDS**

Thomas E. Baker, **Professor of Law, Florida International University College of Law, 2002**, Nevada Law Journal, 3 Nev. L.J. 23, p. 27

Civil rights and civil liberties do not exist in the abstract or in a political vacuum. Chief Justice Rehnquist -- who might be called on to evaluate the constitutionality of the government's response to the threat of terrorism -- has taken a pragmatic view when writing as historian:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order -- in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty. n22

## **National Security Concerns Can Trump Individual Liberty**

### **APPROPRIATE FOR CIVIL LIBERTIES TO YIELD IN ORDER TO PROTECT NATIONAL SECURITY**

William H. Rehnquist, former Chief Justice USSC, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 43

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.

### **VERY REAL THREAT OF TERRORIST ATTACKS AND POTENTIAL IMPACTS DEMANDS THAT THE GOVERNMENT PLACE SECURITY FIRST**

Jeffrey F. Addicott, Assistant Professor of Law, St Mary’s University School of Law, 2002, The Scholar: St.Mary’s Law Review on Minority Issues, 4 SCHOLAR 209, p. 258-9

To some, the War on Terror portends a society in which the rights of the individual will more and more have to give way in favor of ever increasing security measures designed to vindicate the expanding desire of protecting the safety of the public from global terrorism. It may be a correct assessment that the continuing War on Terror places our civil rights vulnerable to erosion, n316 but the so-called “slippery slope” argument which resists all changes in the law must be viewed against the clear and present threat of al-Qa’eda-styled terrorist organizations and their possible use of weapons of mass destruction. The all too real specter of mass casualties, billions of dollars in physical damage, and civil disorder absolutely demands that the federal government fulfill its primary mission of ensuring the safety of its citizens and the viability of democratic institutions.

To date, the American people have overwhelmingly approved of the overall performance of the government in finding a working balance between defending their freedoms n317 while protecting their freedoms. n318 Nevertheless, as the federal government makes policy and directs the nation in the War on Terror, it is prudent to recall the caution of George Washington: “The price of freedom is eternal vigilance.” n319 Accordingly, all measures employed to combat terrorism must be within the bounds of democratic principles and the rule of law, and, more importantly, so-called extraordinary laws should be proportionate to the terrorist threat and frequently reviewed, revised, and rescinded if no longer required.

### **LAWMAKERS AND JUDGES CONSTANTLY BALANCE DUE PROCESS/RIGHTS PROTECTIONS AGAINST PUBLIC SAFETY AND NATIONAL SECURITY**

Richard M. Pious, Barnard College, 2006, The War on Terrorism and the Rule of Law, p. 11-2

News accounts on the “war on terror” are filled with yellow and orange alerts, along with statements by top administration officials warning of imminent attacks and the ultimate danger of nuclear weapons in American cities. Yet in cases involving individuals charged with terrorist acts, the federal courts often rule against the prosecution, even at times dismissing cases against suspected terrorists. This situation occurs in other countries as well: In the United Kingdom a panel of judges in the Law Lord ruled 8 to 1 overturn the indefinite detention of suspected terrorists, calling the process a violation of human rights in the European Community. The prime minister, Tony Blair, apologized to the “Guildford Four” for their imprisonment on charges of terrorist activities (Irish Republican Army bombings in bars) three decades ago—an imprisonment that was a gross miscarriage of justice. In Germany suspected terrorists in the 9/11 conspiracy were freed by courts because of a lack of evidence. In an Italian case involving individuals accused by prosecutors of terrorism because they were sending weapons to Iraqis fighting US forces, the judge ruled that the charges would have to be redefined, because aiding a resistance group against an occupation is not a terrorist act according to Italian law. Are these and other rulings issued because the judges are “soft” on crime and terrorism? Because they prefer to free those guilty of heinous crimes on what hard-line critics refer to as “legal technicalities,” rather than protect their citizens against grave dangers? Do they care more about due process protections than about stopping terrorism? Have courts and prosecutors traded national security away to protect individual rights of the accused? These are fair questions, and subsequent chapters, which deal with cases in this country, will attempt to provide answers. But even before reaching these cases, we might want to consider whether the issue has been framed correctly. Terrorism experts often tell the American people that they must accept tradeoffs between national security and due process of law. Richard Posner, a distinguished jurist and legal scholar, has argued that: “the safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation’s safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty.” Posner argues that all that can reasonably be asked by judges considering the constitutionality of government action is that political institutions weigh the costs as well as the benefits in curtailing liberties. And so the government argues that the due process guarantees must be redefined in terrorism cases because

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the potential costs of actions of terrorists using weapons of mass destruction would be so catastrophic. And it argues that courts should give great deference to the government's weighing of these competing interests. Yet the "balancing" test may well be wrongheaded. To understand why, it may be helpful to borrow from the "model of choice" approach to decision making. When you value two things, you may encounter a tradeoff situation in which you must give up some of one to get some of the other. The question then becomes: How much of the first and how much of the second can I obtain? For example, if you are a student, you might value free time and good grades, but if in order to get the good grades you have to sacrifice some free time, you'll want to sacrifice as little free time as you can to get the good grades. It turns out that some tradeoffs don't make good sense, because they provide less of both valued things than other possible tradeoffs. No student would accept a tradeoff involving getting a B+ for doing 10 hours of weekly homework if another way of studying was available whereby he or she could receive an A- for doing seven hours of weekly homework. The first combination of values is said to be "dominated" by the second combination, because the second gives you more of both values—a higher grade and more free time. When you act in ways that provide the maximum of one value and the maximum of another, you are said by decision theorists and economists to be on the "possibility frontier," a term that defines the maximum it is possible to obtain. (If you settle for less, you are said to be inside the frontier; it is by definition impossible to be on the outside of the frontier—except in your dreams). Ultimately, it is irrational to accept any combination of things you value that are not on that frontier. In fighting terrorism we want the best combination of guarantees of due process of law that protect our personal freedom and our privacy, and of strong government action that protects national security and our own personal security as we travel on buses, trains, and airplanes. In other words, in analyzing the best public policy to combat terror, we want to be on the possibility frontier and not inside it. If we believe that we are already on the possibility frontier, there is nothing left but to accept some tradeoffs, involving more use of the intelligence approach and less of the due process approach in times of greatest danger, as Posner argues. But if we believe that the government is not yet at the possibility frontier, we can argue for an approach that gives us—simultaneously—greater protection for the country as well as continued protections or our individual civil rights and liberties.

#### **SMALL INFRINGEMENTS ON CIVIL LIBERTIES NOW ARE NECESSARY FOR LONG TERM SUCCESS AGAINST TERRORISM AND OVERALL PROTECTION OF CIVIL LIBERTIES**

Michael Walzer, co-editor, *Dissent*, *DISSENT MAGAZINE*, Winter 2002, p.

<http://www.dissentmagazine.org/menutest/archives/2002/wi02/walzer.shtml>, accessed 5/11/2005.

Police work is the first priority, and that raises questions, not about justice, but about civil liberties. Liberals and libertarians leap to the defense of liberty, and they are right to leap; but when they (we) do that, we have to accept a new burden of proof: we have to be able to make the case that the necessary police work can be done, and can be done effectively, within whatever constraints we think are required for the sake of American freedom. If we can't make that case, then we have to be ready to consider modifying the constraints. It isn't a betrayal of liberal or American values to do that; it is in fact the right thing to do, because the first obligation of the state is to protect the lives of its citizens (that's what states are for), and American lives are now visibly and certainly at risk. Again, prevention is crucial. Think of what will happen to our civil liberties if there are more successful terrorist attacks.

#### **TEMPORARY SUSPENSION OF CIVIL LIBERTIES TO PREVENT TERRORISM JUSTIFIED – NO LASTING HARM RESULTS, BUT NO CIVIL LIBERTIES IF TERRORISTS WIN**

Jan C. Ting, Professor of Law, Temple University, 2002, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1147

No one can predict the future with certainty, especially in time of war. History tells us that the struggle for victory in war can turn out to be hostile to the traditional civil liberties of Americans. But, history also reassures us that even those emergency measures enacted in previous wars that most adversely compromised traditional American civil liberties --Lincoln's suspension of habeas corpus, n5 Roosevelt's internment of Japanese-Americans n6 --had no lasting effect on American society once the wars were won and peace restored. If anything, such infringements on civil liberties have heightened our sensitivity, so that today our concern for civil liberties is greater than it has ever been at anytime in our history.

But, if we lose this war against terrorism, no civil liberties will survive. The civil liberty we should be most concerned about right now is the right of all Americans, and non-Americans too, to live their lives in peace, free of the threat of terrorism. That priority must be a factor in our evaluation of what our government has done and will do in the future to put an end to terrorism.

#### **CONSTITUTION REQUIRES BALANCING OF LIBERTY WITH SECURITY – SECURITY ULTIMATELY MOST IMPORTANT**

Michael Stokes Paulsen, Professor of Law, University of Minnesota Law School, 2004, Notre Dame Law Review, July, 2004, 79 Notre Dame L. Rev. 1257, p. 1267

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I submit that three interpretive propositions about the Constitution follow - properly follow - from the general proposition that the law of necessity is an operative principle of the Constitution. They are, in ascending order of difficulty: first, the proposition that the Constitution should be construed, where possible, to avoid constitutionally self-destructive results (a "construe-to-avoid-constitutional-difficulty" canon of construction); second, the proposition that some of the Constitution's provisions apply differently in times of war and crisis than they do in ordinary times; and third, the proposition that, when push comes to shove, specific provisions of the document may need to yield to the need to preserve the operation of the Constitution as a whole (what I call the "rule of constitutional priority"). I will consider each in turn. n21

**SHOULD CAREFULLY BALANCE SECURITY WITH CIVIL LIBERTIES – BUT SECURITY IS UTIMATELY MOST IMPORTANT**

**Michael Stokes Paulsen, Professor of Law, University of Minnesota Law School, 2004**, Notre Dame Law Review, July, 2004, 79 Notre Dame L. Rev. 1257, p. 1257-8

My proposition is a simple but dramatic one: The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements. The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible. The Constitution should be construed to avoid constitutional implosion; it should not lightly be given a disabling, self-destructive interpretation. And where such an alternative saving construction is not possible, the necessity of preserving the Constitution and the constitutional order as a whole requires that priority be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.

**GOVERNMENTAL INTEREST IN PREVENTING TERRORISM OUTWEIGHS BURDEN ON CONSTITUTIONAL RIGHTS**

Tracey Topper **Gonzalez, Clerk to Richard Eaton, US Court of International Trade, 2003**, International and Comparative Law Review, 11 U. Miami Int'l & Comp. L. Rev. 75, p. 94-5

Civil libertarians have attacked the expanded definition of "terrorist activity" as overly broad, n121 but the government's need to employ these classifications is sufficiently compelling to outweigh the burden on constitutional rights. n122 This is because terrorist attacks differ from most other crimes in three important respects: First, terrorist attacks are usually planned well in advance, sometimes for years, n123 by an elaborate network of participants located all over the world. n124 Second, unlike most crimes, terrorist networks require significant funding in order to carry out their attacks. n125 Third, terrorist groups are known to form " sleeper cells," in which the members of the cell participate in activities such as training, fund-raising, and scouting of locations n126 in preparation for future terrorist attacks. n127 In short, because the execution of a large-scale terrorist attack requires training, communication, funding, and planning, it is imperative that law enforcement be able to approach the problem on several different fronts in order to prevent future attacks. Moreover, these provisions defining terrorist activity differ little from either those contained in the Immigration and Nationality Act ("INA") or over a dozen similar laws passed prior to 1997. n128 .

**PREVENTING ANOTHER TERRORIST ATTACK IS THE GREATEST RESPONSIBILITY OF OUR GOVERNMENT – OUTWEIGHS INTRUSIONS ON RIGHTS**

Jan C. **Ting, Professor of Law, Temple University, 2002**, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1146

This is a new kind of war against a new kind of enemy. The terrorists have the advantage of choosing where to attack, when to attack, and how to attack us. By now, more than six months after September 11, it should be clear to everyone that it is simply impossible to put up defenses everywhere, to be maintained all the time, against every conceivable terrorist threat. The only way to defend ourselves is to find the terrorists, at home and abroad, remove them from our midst, imprison them if possible, and kill them if necessary. That is what our armed forces are risking and sacrificing their lives for in Afghanistan and other parts of the world.

And, for the first time since the Civil War, there is a true "home front," where the enemy attacks us from and on American soil. Our government has no greater responsibility than protecting the American people from further terrorist attacks like those of September 11.

**LIBERTY IS NOT ABSOLUTE – SECURITY IS A PREREQUISITE TO LIBERTY**

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Paul **Rosenzweig, Senior Legal Research Fellow, Heritage Foundation, 2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 682-3

Finally, it bears noting that not all solutions necessarily trade off Type I and Type II errors, and certainly not in equal measure. Some novel approaches to combating terrorism might, through technology, actually reduce the incidence of both types of error. n72 More commonly, we will alter both values but the comparative changes will be the important factor. Where many critics of the Patriot Act and other governmental initiatives go wrong is, it seems to me, in their absolutism - they refuse to admit of the possibility that we might need to accept an increase in the number of Type I errors. But that simply cannot be right - liberty is not an absolute value, it depends on security (both personal and national) for its exercise. As Thomas Powers has written: "In a liberal republic, liberty presupposes security; the point of security is liberty." n73 The growth in danger from Type II errors necessitates altering our tolerance for Type I errors. More fundamentally, our goal should be to minimize both sorts of errors.

## **Placing Liberty Above National Security Threatens Survival**

### **CONSTITUTION BECOMES A SUICIDE PACT IF LIBERTY ALWAYS TRUMPS SECURITY**

Paul Rosenzweig, Senior Legal Research Fellow, Heritage Foundation, 2004, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. footnotes

n20 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). Justice Goldberg was quoting Justice Robert Jackson, who made the same observation in Terminiello v. Chicago, 337 U.S. 1 (1949) (Jackson, J., dissenting).

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Id. at 37 (Jackson, J., dissenting).

### **CONSTITUTION NOT A SUICIDE PACT – DOESN'T PLACE CIVIL LIBERTIES ABOVE BASIC NEED FOR SECURITY**

Paul Rosenzweig, Senior Legal Research Fellow, Heritage Foundation, 2004, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 669

Some see in this history a cautionary note. As Professor Stone has said: "In time of war - or, more precisely, in time of national crisis - we respond too harshly in our restriction of civil liberties, and then, later regret our behavior." n19 And we should not disregard that caution.

But reading too much into this history is a mistake - potentially quite a grave one. First, and most obviously, it disregards the reality of necessity. As Justice Arthur Goldberg so famously said, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." n20 And while some of these reactions were plainly overreactions (nobody argues today that the internment of the Japanese served a useful military purpose), others were not.

### **UNRESTRICTED LIBERTY MAKES SOCIETY VULNERABLE TO DESTRUCTION**

Fordham International Law Journal, April, 2003, 26 Fordham Int'l L.J. 1193, p. 1202

Immediately after September 11th, David Blunkett, the Home Secretary, stated: "We could live in a world which is airy-fairy, libertarian, where everyone does precisely what they like and we believe the best of everybody and then they destroy us." n37 In the House of Lords, during the second reading of the Antiterrorist, Crime and Security Act ("ATCSA"), Lord Roper, Home Office Minister, stated:

... it [the Bill] strikes a balance between respecting our fundamental liberties and ensuring that they are not exploited. The problem is that in a tolerant liberal society, if we are not guarded we will find that those who do not seek to be part of our society will use our tolerance and liberalism to destroy that society. That is a reality. n38

### **ABSOLUTE LIBERTY LEAVES US VULNERABLE TO TERRORISTS**

Kentucky Law Journal, 2001 / 2002, 90 Ky. L.J. 1089, p. 1119

Former Attorney General Richard L. Thornburgh has said, "we put emphasis on due process and sometimes it strangles us." n203 He has suggested further that the country might have to compare the current search for information "to brutal tactics in wartime used to gather intelligence overseas and even by U.S. troops from prisoners during military actions." n204 The time we are living in calls for a heightened alertness to looming threats on our nation. n205 The detention of hundreds of individuals based on the terror investigation may be justified, in light of the traditional reasonableness requirement of the Fourth Amendment, by the genuine danger to our nation posed by terrorism, as the Zadvaydas Court suggested. n206

### **CONSTITUTION SHOULD NOT BE INTERPRETED IN WAY THAT PLACES THE SURVIVAL OF THE NATION ABOVE ELSE**

Michael Stokes Paulsen, Professor of Law, University of Minnesota Law School, 2004, Notre Dame Law Review, July, 2004, 79 Notre Dame L. Rev. 1257, p. 1268-9

First and foremost, the "Constitution of Necessity" properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood and applied. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results. Obviously, constitutional suicide is a result to be avoided; interpretations tending toward such an outcome thus should be regarded as strongly disfavored. The need to preserve the Constitution - and accordingly, as Lincoln points out, the need to preserve the nation whose Constitution it is - operates as a rule of construction for other constitutional principles. It follows that specific provisions of the Constitution ought not be read in such a manner as to defeat the fundamental

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purposes and goals of the Constitution, or risk the destruction of the nation, if any other interpretation is legitimately possible. Constitutional provisions should not be construed in a needlessly security-destructive or life-threatening way, if an alternative "saving" construction is fairly possible.

Such a principle should not be thought extraordinarily controversial. It is of a piece with familiar canons of statutory construction that hold that statutes ought not lightly be construed in such a manner as to conflict with the Constitution, if an alternative construction is available. n22 A somewhat more questionable variation has it that statutes should similarly be construed to avoid constitutional difficulty, or constitutional doubts, well short of a showing that the avoided construction actually would present a constitutional infirmity. n23 The principle I urge here is that constitutional provisions, as well as statutory ones, should be construed to avoid "constitutional infirmity" or very [\*1269] serious constitutional difficulty as well - where the constitutionally problematic interpretation to be avoided is one that would strongly tend to undermine the existence of the nation and thus the operation of the Constitution in its entirety. The premise is that an interpretation of a provision that led to (in Lincoln's words) "the wreck of government, country, and Constitution all together" n24 would be, in a sense, a construction tending toward unconstitutionality, and is to be avoided on such account.



## **National Security Concerns Justify Military Tribunals**

### **MILLIGAN WRONG – CONGRESS SHOULD BE ABLE TO AUTHORIZE MILITARY TRIBUNALS TO ADDRESS NATIONAL SECURITY MATTERS**

William H. Rehnquist, former Chief Justice USSC, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 43-4

Was the dictum in the *Milligan* case, for example—saying that Congress could not authorize trials by civilians by military tribunals where civil courts were functioning and there was no invasion by hostile forces—a wise exercise of judicial power? The reasoning of the majority in that case would rule out not merely trials of civilians by military commissions but trials of civilians by a duly appointed federal judge without a jury. One may fully agree with the rather disparaging but nonetheless insightful argument of Jeremiah Black in the *Milligan* case – soldiers are no more occupationally trained to conduct trials than are sailors or sheep drovers—and yet believe that Congress should be able to provide for trial of defendants by a judge without a jury in a carefully limited class of cases dealing with national security in wartime.

## **Military Commissions Effective Alternative for Terror Suspects**

### **MILITARY COMMISSIONS BEST BALANCE SECURITY AND RIGHTS NEEDS**

Ashley **Pope, JD**, Fordham International Law Journal, February **2011**, “After Guantanamo: Legal Rights of Foreign Entities Held in United States War on Terror,” p. 545-6

Once Guantanamo no longer holds foreign nationals "captured" in the "war on terror," the United States can move beyond the Bush - and now the Obama - administration's years of letting detainees languish at Guantanamo. After they are in the United States, however, the next step should be to prosecute them before military commissions. While a federal criminal trial provides "gold medal justice," it may not be possible to try "war-on-terror" detainees in this system due to the continuing legacy of Guantanamo and the questionable tactics used against detainees during the Bush administration. Those who can be tried in the federal system, of course, should be, as few question the legitimacy of those proceedings. Trial before a military commission should not be looked upon, however, as a failure. The Obama administration should embrace military commissions as an improvement upon the recent past 265 and seize the opportunity to acknowledge that the government violated many detainees' rights. Use of the commissions to prosecute terrorism can be viewed as a necessary apology for the last few years and an impetus to do better in the future. Trials before a military commission are, in reality, the only option for many of the detainees still in custody at Guantanamo that strikes a balance between the need to legitimize the continued detention of those too dangerous to release and the need to redeem the United States' reputation among its allies.

### **MILITARY TRIBUNALS SATISFY THE GENEVA CONVENTIONS**

Ashley **Pope, JD**, Fordham International Law Journal, February **2011**, “After Guantanamo: Legal Rights of Foreign Entities Held in United States War on Terror,” p. 547

Going forward, federal criminal trials would become more feasible, depending on the circumstances surrounding pre-trial detention. Concerns about torture behind closed doors should be alleviated now that detainees are protected from enhanced interrogation techniques and other questionable treatment. As discussed above, trial before a military commission on US soil is also a lawful and appropriate option, should it be necessary, but it is difficult to provide a persuasive reason why a civilian criminal trial would not be the preferred option. After all, a criminal trial in federal court unquestionably satisfies the Geneva Conventions. Trial before a military commission as constituted under the MCA of 2009, however, would satisfy the Geneva Conventions as well.

### **NEW, IMPROVED PROCEDURAL PROTECTIONS FOR THOSE TRIED IN FRONT OF MILITARY COMMISSIONS**

Peter **Shane, Chair in Law, Ohio State**, New York Law School Law Review, **2011/12**, “The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World,” pp. 34-5

On the use of military commissions, President Obama waited until May 2009 before publicly stating that such commissions "are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered." In taking that stance, however, he indicated five respects in which he felt the version of military commissions offered by the Bush administration was inadequate. Following the President's statement, then secretary of defense Robert M. Gates amended military commission procedures to (1) prohibit the admission of statements obtained through cruel, inhuman, and degrading treatment; (2) give detainees greater latitude in their choice of counsel; (3) afford protection for those defendants who refuse to testify; (4) place the burden of justification for using hearsay on the party trying to use it; and (5) confirm that military judges are empowered to determine their own jurisdiction. In October 2009 President Obama signed into law the Military Commissions Act of 2009, which made all five changes statutory.

### **MILITARY TRIBUNALS HAVE LONG HISTORY IN US – CONSTITUTIONALLY PERMISSIBLE**

Jan C. **Ting, Professor of Law, Temple University**, 2002, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1154

President Bush's military order of November 13, 2001, established military tribunals, which may be used to try foreign terrorists. <sup>n56</sup> Such tribunals have been employed by the United States throughout history, even before adoption of the Constitution, and during the Mexican and Civil Wars. <sup>n57</sup> Military tribunals were

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held to be constitutional by the United States Supreme Court, unanimously, during World War II in *Ex parte Quirin*, a case that upheld death sentences for enemy saboteurs. n58

It was unnecessary for the Supreme Court in *Quirin* to determine whether the President as Commander-in-Chief had the constitutional power to create military tribunals without the support of explicit Congressional legislation because such legislation had been enacted in 1942. n59 But, the Supreme Court suggested that such constitutional power existed by stating: By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. n60

## **MILITARY COMMISSION TRIALS FOR TERRORISTS BETTER AND CONSTITUTIONALLY ACCEPTABLE**

Viet D. Dinh, Assistant Attorney General, DOJ, 2002, Harvard Journal of Law & Public Policy, 25 Harv. J.L. & Pub. Pol'y 399, p. 405-6

Finally, the President has authorized military commissions to try members of Al Qaeda and other non-citizen terrorists for violations of the laws of war. Trying terrorists before military commissions offers a number of practical advantages over ordinary civilian trials. First, commissions enable the government to protect classified and other sensitive national-security information that would have to be disclosed publicly before an Article III court. Second, ordinary criminal trials would subject court personnel, jurors, and other civilians to the threat of terrorist reprisals; the military is better suited to coping with these dangers. And third, military commissions can operate with more flexible rules of evidence, which would allow the introduction all relevant evidence regardless of whether, for example, it has been properly authenticated.

The Supreme Court has unanimously upheld the constitutionality of military commissions, n11 and since its founding our Nation has used them to try war criminals, as have our international allies. During World War II, President Roosevelt ordered eight Nazi saboteurs tried by military commission. After the Civil War, a commission was used to try Confederate sympathizers who conspired to assassinate President Lincoln. And during the Revolutionary War, General Washington convened a military commission to try British Major Andre as a spy. Moreover, the President's authority to convene military commissions is confirmed by Article 21 of the Uniform Code of Military Justice. n12 In 1942, the Supreme Court interpreted identical language, then appearing in the Articles of War, as recognizing the President's power to try war crimes [\*406] before military commissions. n13 And America and her allies made liberal use of military commissions after World War II to try war criminals both in the European and Pacific theater. n14

## **MILITARY TRIBUNALS FOR TERRORIST SUSPECTS CONSTITUTIONALLY OK**

Jeffrey F. Addicott, Assistant Professor of Law, St Mary's University School of Law, 2002, The Scholar: St.Mary's Law Review on Minority Issues, 4 SCHOLAR 209, p. 246-7

Although the Supreme Court has long held the Constitution's Fifth n228 and Sixth Amendment n229 protections apply to non-United States citizens, n230 such protections do not extend to individuals subjected to trial in military tribunals for war crimes. Seemingly, the use of military tribunals has deeply seated historical and legal precedent as long as the non-citizen combatants are charged with violations of the law of war. In *Application of Yamashita*, n231 the Court traced the history of military tribunals and concluded: "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants ... Congress gave sanction, as we held in *Ex Parte Quirin*, to any use of military commissions contemplated by the common law of war." n232

While various issues remain to be worked out, n233 challenging the constitutionality of military tribunals to try the al-Qa'eda terrorists for war crimes will prove a difficult task. In its January 2002 report on the lawfulness of using military tribunals, the American Bar Association (ABA) Task Force on Terrorism and Law found the terror attacks of September 11, 2001, were arguably violations of the law of war that would justify the use of military tribunals to prosecute accused terrorists. n234 Similarly, in February 2002, the ABA House of Delegates supported the President's proposed use of military tribunals, but recommended the implementing regulations afforded to "an accused in any military tribunal be raised to the level that would satisfy the requirements of fundamental fairness." n235

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## **Military Commissions Key to Protect Anti-Terrorism Efforts**

### **MILITARY TRIBUNALS ARE CRITICAL TO PROTECTING ANTITERRORIST INTELLIGENCE**

Amitai Etzioni, GWU Sociology Prof, 2003, ["Better Safe Than Sorry," The Weekly Standard, 7/21, <http://www.gwu.edu/~ccps/etzioni/B425.html>]

Military Tribunals. There is a clear need to avoid disclosing our intelligence sources and methods in open court--so much so that in several instances, an American charged with espionage has been allowed to bargain down the sentence to avoid his pleading not guilty, which would necessitate a public trial. Terrorists should not be allowed to benefit from a right to demand a public trial.

## **Terrorism Violates Due Process and Other Rights**

### **SUCCESSFUL TERRORIST ATTACK AGAINST THE US WILL END AMERICAN DEMOCRACY AND CIVIL LIBERTIES**

Christopher H. Lytton, Attorney, 2003, Journal of Transnational Law & Policy, 12 J. Transnat'l L. & Pol'y 197, p.207-8

America now faces the legitimate risk of having its institutions and ideals destroyed by the enemies of democracy and the west. If another terrorist attack succeeds in destroying the White House, a nuclear power plant, or a packed athletic stadium, there is no question that civil liberties will be significantly curtailed in the resulting scramble to restore security. Curfews, checkpoints, and invasions of privacy could become the norm. Life in America would be akin to life in Israel, where civilians are forced to live under a cloud of fear, shopping and dining surrounded by tanks and machine guns. This scenario represents the greatest threat to the existence of American democracy.

### **TERRORISM RESULTS IN MASSIVE CIVIL VIOLATIONS, THE COLLAPSE OF DEMOCRACY, AND MILITARISM**

Michael Ignatieff, Harvard Human Rights Prof, 2004, [The Lesser Evil: Political Ethics in an Age of Terror, pg. 153-154]

It is a commonplace of presidential and prime ministerial rhetoric to insist that their democracies cannot lose in a war on terror. My own analysis thus far has confirmed that no democracy has ever been toppled by a terrorist campaign, unless other factors, like economic collapse or military defeat, were present too. But faced with terrorism that deploys weapons of mass destruction, we cannot be as certain that the historical pattern, argued for in this book, would prevail in the future. In other words, we could lose. What would defeat look like? It would not be like invasion, conquest, or occupation, of course, but rather would entail the disintegration of our institutions and way of life. A succession of mass casualty attacks, using weapons of mass destruction, would leave behind zones of devastation sealed off for years and a pall of mourning, anger, and fear hanging over our public and private lives. Such attacks would destroy the existential security on which democracy depends. Recurrent attacks with weapons of mass destruction might not just kill hundreds of thousands of people. We might find our selves living with a national security state on permanent alert, with sealed borders, constant identity checks, and permanent detention camps for suspicious aliens and recalcitrant citizens. A successful attack would poison the wellsprings of trust among strangers that make the relative liberty of liberal democracy possible. Our police forces might descend to torturing suspects in order to prevent future attacks, and our secret security forces might engage in direct assassination of perpetrators or mere suspects as well. Our military might itself use weapons of mass destruction against terrorist enemies. If our institutions were unable to stop the attacks, the state's monopoly of force might even break down, as citizens took the law into their own hands seeking to defend themselves against would-be perpetrators. Vigilantes would patrol blighted and deserted streets. This is what the face of defeat might look like. We would survive, but we would no longer recognize ourselves or our institutions. We would exist but lose our identity as free people.

### **NO CIVIL LIBERTIES WITHOUT SECURITY**

Douglas W. Kmiec, Professor of Law, Catholic University of America, January 10, 2003, "Properly Dismissed," <http://www.nationalreview.com/comment/comment-kmiec011003.asp>

It is possible that some will still contend that the wrong balance was struck and civil liberty has been lost. Yet, the separation of powers vindicates not only liberty, but also security. For the judiciary to have intruded more searchingly would have undermined the nation's safety. Liberty dies not only when military or executive officers overstep their authority, but also when a nation is incapable of defending itself from foreign attack.

### **SUCCESSFUL TERRORIST ATTACKS WILL RESTRICT LIBERTY**

Donald A. Dripps, Professor of Law, University of Minnesota Law School, 2003, The Ohio State Journal of Criminal Law, 1 Ohio St. J. Crim. L. 9, p. 28

As anti-terror surveillance authority runs into the pervasive illegal behaviors, we can expect powerful resistance to the creation of the surveillance authority. Sooner or later terrorist successes will force the opposition to give way, with assurances that both by legal limitation and discretionary restraint current behavior patterns will not be disturbed. Legal limits predicated on bifurcation strategies are, as previously discussed, unlikely to contain the new powers.

### **REAL THREAT TO CIVIL LIBERTY WILL COME FROM ANOTHER SUCCESSFUL TERRORIST ATTACK**

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Robert J. Grey, Jr., **President-Elect of the American Bar Association, 2004**, Thomas M. Cooley Law Review, 2004, 21 T.M. Cooley L. Rev. 1, p. 7- 8

We can be very thankful that we have gone almost two years without an attack on our soil. Our real moment of truth comes after the next attack, or the one after that, or if attacks become more frequent and commonplace as they have in other parts of the world.

The real test comes when there is a collective panic that sets in. What then? Will we look to what happened in our past, in terms of our response to the Japanese during World War II, where we said never again? But how many terrorist attacks will it take before we begin to stigmatize, stereotype, or call for the segregation or deportation of an entire ethnic group? Fear, after all, is indeed a very powerful emotion.

## **FAILURE TO PREVENT TERRORISM WILL CAUSE CIVIL LIBERTIES TO SUFFER GREATLY**

Christopher H. Lytton, **Attorney, 2003**, Journal of Transnational Law & Policy, 12 J. Transnat'l L. & Pol'y 197, p. 203

Today, it appears that the United States military must assist civilian law enforcement in order to ensure the domestic security of [\*203] the nation. Waiting until the situation worsens could have disastrous consequences for democracy. If the citizens of this nation deny an expanded role for the military and further acts of terrorism occur within our borders, only then is it rational to surmise that civil liberties, from Main Street to Wall Street, will suffer greatly. Taken to the extreme, such an environment could ultimately lead to the end of federalism, the centralization of power, and eventually, to totalitarianism and/or balkanization. We need only look to the continuing tragedy in Israel to verify that the consequences of having one's enemies at the gates, when the gates cannot be locked, are tragic and costly. Cafes, discos, markets, restaurants, and high-rises are the new battlefields in the war against freedom and democracy.

## **ANOTHER SUCCESSFUL TERRORIST ATTACK BY MUSLIMS WILL OBLITERATE CIVIL RIGHTS**

Daniel M. Filler, **Associate Professor, University of Alabama School of Law, 2003**, Virginia Journal of Social Policy & the Law, 10 Va. J. Soc. Pol'y & L. 345, p. 372-4

To understand how these new links might be used to transform American legal responses to terrorism, one must consider how public concern might unfold in the aftermath of future terrorist attacks. The horrors of September 11th cannot be minimized; the mere act of imagining future terrorism is not intended to trivialize these appalling incidents. Nonetheless, in order to provide some guidance should future [\*373] attacks occur, it is essential to evaluate how this emerging rhetoric might inform public responses to a new terrorist incident.

As shown, *supra*, the American response to September 11th exhibited signs of both moral panic and risk society panic. While the public demonized Muslims initially, over time its anger was directed at many other culprits. Perhaps, as a result, the nation's legal response to terrorism was somewhat muted. Imagine, then, that America again suffers a severe terrorist attack inflicted by radical Muslims, n160 Imagine, also, that Muslim American citizens are implicated in the attack. In the past year, two American citizens - Jose Padilla and Esam Hamdi - have been detained as enemy combatants n161 and Muslim Americans have been arrested in Buffalo, n162 Portland, n163 Ann Arbor, n164 Chicago, n165 and Tampa n166 on charges that they were planning terrorism or otherwise involved with terrorist organizations. How might the nation respond to such an occurrence?

Americans might feel ambivalent about the root causes of such an attack. One can easily imagine citizens initially focusing on the Muslim community. Those perceived to be Muslims might again be subjected to random acts of violence. For the same reasons as before, opinion leaders - including the President - might again work to subdue this response. Citizens might continue to feel concern about governmental failures, believing that the nation's leaders failed to respond properly to events of 2001. Legislators might push for incrementally tougher anti-terrorism laws, while also agitating for further changes in the bureaucracy of homeland security. Commentators, meanwhile, might call for reconsideration of the country's foreign policy.

[\*374] On the other hand, there would likely be voices arguing that Muslims (or perhaps Arabs) should be held responsible for the new attack. Already, Peter Kirsanow, a member of the United States Civil Rights Commission, has suggested that if terrorists strike again, "and they come from the same ethnic group that attacked the World Trade Center, you can forget about civil rights." n167 Just as some commentators called for racial profiling after the first attack, it seems likely that people would argue for religion-based or ethnicity-based policing on the grounds that, since members of the same group committed both acts, society can confidently predict the identity of future culprits.

America's leaders might also push the public towards demonizing Muslims in the hope of offering a simple and reassuring solution to the crisis. In the effort to quell widespread fear, they might argue in favor of isolating and incapacitating a single demon. More importantly, however, development of a moral panic could serve the personal and professional interests of many parties. In a risk society panic, public blame might again target intelligence agencies, regulators, and governmental leaders. Damaging investigations could undermine the credibility of government as a whole. Individual officials could lose their jobs or, worse, be prosecuted for incompetence. Operators of risky industrial and technological facilities - from chemical plants to toxic waste disposals - might prefer a moral panic since in a risk society panic,

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legislators might be pushed to adopt expensive and unrealistic new regulations with the goal of rendering inherently dangerous operations safe. Some government agencies might also affirmatively benefit from a moral panic. Just as J. Edgar Hoover promoted public anxiety about a series of issues, ranging from sex crime to parole scandal, in order to maintain strong FBI funding, n168 one might expect the FBI or the Office of Homeland Security to promote such targeted anxiety in the hopes of maintaining and expanding their fiefdoms.

## **AT: “Due Process Critical to Democracy”**

### **ALL MODERN DEMOCRACIES RECALIBRATE BALANCE BETWEEN SECURITY AND LIBERTY WHEN NEW SECURITY THREATS ARISE**

Samuel Issacharoff & Richard Pildes, Professors of Law Columbia Law School and NYU School of Law, 2004, Theoretical Inquiries in Law, 5 Theoretical Inq. L. 1, p. 2-3

Times of heightened risk to the physical safety of their citizens inevitably cause democracies to recalibrate their institutions and processes and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in "normal" times. This was true for France [\*3] during its experience with Middle Eastern terrorism in the 1980s; n1 for Germany during its encounter with the domestic terrorism of the Baader-Meinhoff gang in the 1970s; n2 for Great Britain during the sustained violent conflict in Northern Ireland (as well as today); n3 for Italy in its conflicts with law-and-order terrorist bombings in the 1970s; n4 for Spain during the 1980s; n5 for India in its struggles to maintain order in the midst of the largest and one of the most heterogeneous democracies in the world; n6 and for Israel during [\*4] its long-running struggle with terrorism. n7 It is now true for the United States as well, as the government (national and state) modifies the legal framework designed for normal times to adjust to the radical new security threat n8 posed by militant Islamic fundamentalism reflected in the events of September 11, 2001. These changes may be effective or counterproductive, necessary or excessive. But that change will take place is certain, based on the experience of all modern democracies confronted with security threats of this type and magnitude.

### **DEMOCRACY LIMITS GOVERNMENT ACCOUNTABILITY TO ITS CITIZENS**

Bernard Manin, et al, Professor, Department of Politics, NYU, 1999, Democracy, Accountability and Representation, eds, Przeworski, Stokes and Manin, p. 4

This claim is widespread. To take just a few examples, Dahl (1971:1) asserts that “a key characteristic of a democracy is the continued responsiveness of the government to the preferences of its citizens.” Riker (1965:31) claims that “democracy is a form of government in which the rulers are fully responsible to the ruled.” Schmitter and Karl (1991: 76) maintain that “modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens.” Indeed, our political system was distinguished from all its predecessors as one of “representative” government long before it was identified as a democracy.



## **AT: “Restricting Rights of Non-Citizens Will Restrict Citizens’ Rights”**

### **LITTLE RISK THAT INFRINGEMENTS ON CIVIL LIBERTIES OF NON-CITIZENS WILL BE APPLIED LATER TO CITIZENS**

Mark Tushnet, **Professor of Constitutional Law**, Georgetown University Law Center, Wisconsin Law Review, 2003, 2003 Wis. L. Rev. 273, p. 297-8

In some instances, the actions taken might be true violations of civil liberties. But, again, they are violations of the rights of residents who are not U.S. citizens. David Cole argues that such violations might have spill-over effects on the rights of citizens. n86 That is, once we get accustomed to these actions when taken against non-citizens, we will be more comfortable about extending them to citizens. n87 That may be true, but the threat to citizens has not yet materialized, except, as I have suggested, in connection with the detentions of citizens as members of an enemy army. In Cole's words: "Measures initially targeted at non-citizens may well come back to haunt us all." n88 My claim about social learning is that, while the possibility Cole identifies is a real one, its magnitude is smaller than he suggests.

Cole uses the example of the 1920s Red Scare and its extension in the McCarthy era to illustrate his claim. n89 His thought is that McCarthyism shows that we learned that rules applied at first against non-citizens could then be applied to citizens. Similarly, the rules applied today against non-citizens may be applied in the future to citizens. But, one might describe the process of social learning differently. After all, the McCarthy era involved not just the application of rules proscribing various forms of expression, but the development of constitutional doctrine constraining the application of those rules. So, it might be that what we learned is this: Actions that seem constitutionally permissible when taken against non-citizens will be treated as constitutionally problematic when they are taken against citizens. n90

## **AT: “Citizenship is Exclusionary/Entrenches Hierarchies”**

### **CITIZENSHIP ALLOWS PEOPLE TO CLAIM RIGHTS AND ASSERT THEIR IDENTITY AS A MEANS TO CHALLENGE DOMINANT SYSTEMS**

Engin F. Isin, and Patricia K. Wood, Assistant Professor at York University, Canada, 1999, Citizenship and Identity, p.4

This book takes a different tack. We approach the relationship between citizenship and identity from a perspective that sees modern citizenship not only as a legal and political membership in a nation-state but also as an articulating principle for the recognition of group rights. We conceive of citizenship broadly – not only as a set of legal obligations and entitlements which individuals possess by virtue of their membership in a state, but also as the practices through which individuals and groups formulate and claim new rights or struggle to expand or maintain existing rights. Rather than regarding citizenship and identity as antinomic principles, we recognize the rise of new identities and claims for group rights as a challenge to the modern interpretation of universal citizenship, which is itself a form of group identity. Instead of either eradicating or flattening the tension between citizenship and identity, we aim to make a productive use of it. We seek a new conception of citizenship (and thus the state), with an emphasis on the practice of democracy, that would meet the needs of a diverse citizenry facing the challenges of advanced capitalism.

### **CITIZENSHIP IS MEANS THROUGH WHICH DIFFERENT SOCIAL POSITIONS CAN BE ARTICULATED. IT ALLOWS FOR A RADICAL RESTRUCTURING OF RIGHTS.**

Engin F. Isin & Patrick K. Wood, York University, 1999, Citizenship and Identity, p. 12

What would be the idea of citizenship emerging out of a radical societies? Radical democratic citizenship can be a form of identification, not simply a legal status. The citizen is neither, as in liberalism, someone who is a passive bearer of rights nor, as in civic republicanism, someone who accepts submission to the rules prescribed by the political association. To put it another way, citizenship is not just one identity among others, as in liberalism, or the dominant identity that overrides all others, as in civic republicanism. Rather, it is an articulating principle that affects the different subject positions of the social agent...while allowing for a plurality of specific allegiances and for the respect of individual liberty. The underlying conception of the social agent of the idea of citizenship is ‘not a unitary subject but as the articulation of an ensemble of subject positions, constructed within specific discourses and precariously and temporarily sutured at the intersection of those subject positions’. These multiple subject-positions have evolved in the last few years in movements demanding democratic rights, such as black, gay ecological and other social movements. Radical democratic citizenship does not simply and other social movements. Radical democratic citizenship does not simply extend the sphere of rights in order to include these groups but allows for the radical mutual restructuring of these identities and the polity. Radical democratic citizenship becomes the common political identity of these multiple subject-positions.

### **ALTHOUGH LEGAL CITIZENSHIP MAY HAVE ORIGINATED IN THE WEST, IT HAS NONETHELESS EXPANDED TO NEARLY EVERY NATION-STATE. ALTERNATE CONCEPTIONS OF CITIZENSHIP HAVE BEEN AROUND FOR CENTURIES**

Engin F. Isin, and Patricia K. Wood, Assistant Professor at York University, Canada, 1999, Citizenship and Identity, p. 4-6

Since the late eighteenth century, the polity that has ‘colonized’ everyday life in the world has been the nation-state. Every nation-state in the world today identifies individuals based on set criteria (birth, blood, nationality) and registers them with identity papers such as passports and citizenship certificates. Each nation-state also has elaborate rules and regulations governing naturalization (accepting those who are not born in the state) and the rights of immigrants who are not citizens. Each also has elaborate rules of acceptance to its territory either as visitors, temporary or permanent workers, refugees and ‘aliens.’ Such issues as how many immigrants to accept, what rights they should possess, under what conditions and criteria they should be granted citizenship, and whether such citizenship should be the same as native born and naturalized citizens are hotly contested (Brubaker, 1992, 1996; Soysal, 1994; Spinner, 1994). Therefore, although it may be considered rather ethnocentric not to make the usual distinction between the ‘Western’ and ‘non-Western’ worlds, citizenship has become a widely used and institution throughout the world. Regardless of the dictatorship), citizenship has been instituted in almost every nation-state around the world. Of course, as many works in the burgeoning field of citizenship studies have shown, the composition of civil, political and social rights

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and the sphere of its cultural, symbolic and economic practices vary widely from one nation-state to the other (Janoski, 1998). Nevertheless, modern citizenship is no longer an institution unique to the West. Yet, it is widely believed that citizenship originated in the West. It is impossible today to discuss its various aspects without some reference to its origins and history. Weber (1927) consistently argued that citizenship originated in the West and that the 'oriental' civilizations such as Chinese, Indian and Middle Eastern 'lacked' such a concept. This claim is problematic, if not ethnocentric, because what Weber was searching for in these civilizations was an already worked-out conception of citizenship as a legal status. It can be argued, however, that each of these civilizations had a different conception of political membership and status and, thus a different conception of citizenship. In other words, Weber made citizenship originate in the West in the sense that he worked out an ideal type and searched for its origins. But this ideal type was of 'Western' civilization or, rather, of those times and spaces of history that have been appropriated as 'Western.' This points towards two problems we wish to avoid when we discuss citizenship: naturalism and historicism. It is very important to recognize that the status and practice of citizenship emerged in specific places in response to specific struggles and conflicts. It is a contested and contingent field that allowed for the mediation of conflict, redistribution of wealth and recognition of various individual and group rights throughout history. The fact that it eventually became universal should be interpreted not as 'natural' but rather as contingent and political. Similarly, its widespread use today cannot be taken as a sign of its future durability or stability. Even in recent memory citizenship rights have been suspended or radically altered by groups who have established their hegemony and imposed their view of the world on other groups.

The boundaries of citizenship in the sense of who does and does not have access to its membership and the nature of the rights and obligations associated with that membership have always been contested. Even the Ancients wrestled with such debates: the Greek warriors and peasants fought bloody wars for centuries and there was never a long period where the institution was stable and durable. Similarly, its widespread use today cannot be taken as a sign of its future durability or stability. Even in recent memory citizenship rights have been suspended or radically altered by groups who have established their hegemony and imposed their view of the world on other groups.

The boundaries of citizenship in the sense of who does and does not have access to its membership and the nature of the rights and obligations associated with that membership have always been contested. Even the Ancients wrestled with such debates: the Greek warriors and peasants fought bloody wars for centuries and there was never a long period where the institution was stable and durable. Similarly, Roman patricians and plebeians fought violent battles to define and redefine citizenship. In the modern era, citizenship involved various group and class conflicts as well. The rise of the welfare state and the securing of social rights for the working class are relatively new that attacks on such social rights by various neoliberal regimes remind us their fragility, for example, convincingly demonstrated how neoliberal regimes in Britain between 1979 and 1997 scaled back not only social rights, as is well known, but even civil and political rights that are thought to be 'sacred' in liberal democracies. Thus, not only is citizenship an unstable concept throughout history, but it has also been a highly contested and constantly changing institution.

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### **\*Torture Answers\***

## **US Has Moved To Prohibit Torture**

### **OBAMA HAS STOPPED WATER-BOARDING**

Tung Yin, law professor, Lewis & Clark, Harvard Journal of Law & Public Policy, Spring 2011, “PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,” p. 454

In other areas, President Obama has rightly changed policy to avoid practices, such as waterboarding, that were regarded by many as of questionable legal validity

### **OBAMA BANNED WATERBOARDING**

Tung Yin, law professor, Lewis & Clark, 2011, National Security, Civil Liberties, and the War on Terror, ed. Katherine Darmer and Richard Fybel, p. 108

The Obama Administration viewed waterboarding differently. Unlike Mukasey, Obama's nominee for Attorney General Eric Holder unequivocally stated during his confirmation hearings that he believed waterboarding to be torture. President Obama quickly banned the procedure upon assuming office.

### **TORTURE WAS EVEN ABANDONED AT THE END OF THE BUSH ADMINISTRATION**

Tung Yin, law professor, Lewis & Clark, Harvard Journal of Law & Public Policy, Spring 2011, “PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,” p. 458-9

The Bush Administration sought, and obtained, legal opinions regarding the legality of the CIA's so-called enhanced interrogation techniques from the Office of Legal Counsel (OLC). The infamous "Standards of Conduct for Interrogation" memorandum authored by then-Deputy Attorney General John Yoo, which was not publicly released until 2005, opined that interrogation tactics might constitute degrading conduct but not torture so long as they did not cause physical pain equivalent to that caused by organ failure. However, when Jack Goldsmith took over as Assistant Attorney General for OLC, he withdrew the Yoo memorandum because he concluded that it was flawed. After Goldsmith's departure, then-Acting Assistant Attorney General Dan Levin wrote a replacement memorandum that began by stating: "Torture is abhorrent both to American law and values and to international norms." By the latter part of President Bush's tenure, the CIA had apparently abandoned its enhanced interrogation techniques.

### **OBAMA HAS EVEN BANNED ENHANCED INTERROGATION TECHNIQUES**

Tung Yin, law professor, Lewis & Clark, Harvard Journal of Law & Public Policy, Spring 2011, “PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,” p. 459

Even with the withdrawal of the Yoo memorandum and the elimination of waterboarding, the Bush Administration remained defined to its end by the aggressive interrogations that took place at Guantanamo and in the secret CIA prisons. Upon assuming office, President Obama issued an executive order limiting U.S. government interrogation methods to those approved of in the U.S. Army Field Manual --a widely applauded decision.

## **Torture Claims Exaggerated**

**REPORTS OF ABUSE ARE EXCEPTIONS TO THE RULE AND ARE OVERBLOWN FOR POLITICAL REASONS**  
**WALL STREET JOURNAL, 2009** [**"THE REAL CIA NEWS"**, AUGUST 29TH, [HTTP://ONLINE.WSJ.COM/ARTICLE/SB10001424052970203706604574375012840827276.HTML#PRINTMODE](http://online.wsj.com/article/SB10001424052970203706604574375012840827276.html#printmode)]

Interrogations were carefully limited, briefed on Capitol Hill, and yielded information that saved innocent lives. Whoever advised people to be skeptical of what they read in the papers must have had in mind this week's coverage of the documents about CIA interrogations. Now that we've had a chance to read the reports, it's clear the real story isn't the few cases of abuse played up by the media. The news is that the program was thoughtfully developed, carefully circumscribed, briefed to Congress, and yielded information crucial to disrupting al Qaeda.

In other words, it worked—at least until politics got in the way.

That's the essential judgment offered by former CIA Inspector General John Helgerson in his 2004 report. Some mild criticism aside, the report says the CIA "invested immense time and effort to implement the [program] quickly, effectively, and within the law"; that the agency "generally provided good guidance and support"; and that agency personnel largely "followed guidance and procedures and documented their activities well." So where's the scandal?

### **HUMAN RIGHTS ABUSES IN GUANTANAMO NOT SUPPORTED**

**Tung Yin, law professor, Lewis & Clark, Harvard Journal of Law & Public Policy, Spring 2011, "PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,"** p. 458

Stories about the abusive and coercive interrogation tactics used at Guantanamo Bay <sup>23</sup> (and their comparison to the abuses that occurred at the Abu Ghraib prison in Iraq with disastrous consequences) no doubt played a significant role in inflaming public opinion about the detention facility. Other rumored mistreatment, such as the deliberate destruction of copies of the Koran, did not occur, was not substantiated, or was exaggerated or otherwise wrongly described, but was so incendiary as to add to the outrage over Guantanamo. (Waterboarding, or simulated drowning, does not appear to have been used at Guantanamo, only in secret prisons operated by the Central Intelligence Agency (CIA) in Eastern Europe.)

## **Torture Not Immoral**

**TORTURE IS NOT IMMORAL – IT PREVENTS THE MURDER OF MANY MORE INNOCENT PEOPLE**  
**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

While a "civilized" community does not typically condone such conduct, this Article contends that torture is morally defensible in certain circumstances, mainly when more grave harm can be avoided by using torture as an interrogation device. The pejorative connotation associated with torture should be abolished. A dispassionate analysis of the propriety of torture indicates that it is morally justifiable. At the outset of this analytical discussion, this Article requires readers to move from the question of whether torture is ever defensible to the issue of the circumstances in which it is morally permissible.

Consider the following example: A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this intent via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.

Who in the world would deny that all possible means should be used to extract the details of the plane and the location of the bomb? <sup>n7</sup> The answer is not many. <sup>n8</sup> The passengers, their relatives and friends, and many in society would expect that all means should be used to [\*584] extract the information, even if the pain and suffering imposed on the terrorist resulted in his death.

Although the above example is hypothetical and is not one that has occurred in the real world, the force of the argument cannot be dismissed on that basis. As C.L. Ten notes, "fantastic examples" that raise fundamental issues for consideration, such as whether it is proper to torture wrongdoers, play an important role in the evaluation of moral principles and theories. <sup>n9</sup> These examples sharpen contrasts and illuminate the logical conclusions of the respective principles to test the true strength of our commitment to the principles. <sup>n10</sup> Thus, fantastic examples cannot be dismissed summarily merely because they are "simply" hypothetical.

Real life is, of course, rarely this clear cut, but there are certainly scenarios approaching this degree of desperation, <sup>n11</sup> which raise for discussion whether it is justifiable to inflict harm on one person to reduce a greater level of harm occurring to a large number of blameless people. Ultimately, torture is simply the sharp end of conduct whereby the interests of one agent are sacrificed for the greater good. As a community, we are willing to accept this principle. Thus, although differing in degree, torture is no different in nature from conduct that we sanction in other circumstances. It should be viewed in this light.

**TORTURE IS MORAL – PROTECTING THE RIGHT TO LIFE OUTWEIGHS**  
**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

The key consideration regarding the permissibility of torture is the magnitude of harm that is sought to be prevented. To this end, the appropriate measure is the number of lives that are likely to be lost if the threatened harm is not alleviated. Obviously, the more lives that are at stake, the more weight that is attributed to this variable. Lesser forms of threatened harm will not justify torture. Logically, the right to life is the most basic and fundamental of all human rights - non-observance of it would render all other human rights devoid of meaning. <sup>n122</sup> Every society has some prohibition against taking life, <sup>n123</sup> and "the intentional taking of human life is ... the offence which society condemns most strongly." <sup>n124</sup> The right to life is also enshrined in several international covenants. For example, Article 2 of the European Convention on Human Rights (which in essence mirrors [\*612] Article 6 of the International Covenant on Civil and Political Rights) provides that "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." <sup>n125</sup> Torture violates the right to physical integrity, which is so important that it is only a threat to the right to life that can justify interference with it. Thus, torture should be confined to situations where the right to life is imperiled.

**THE AFF DISPLAYS MORAL NIHILISM BY LIMITING THE SCOPE OF THEIR MORAL EVALUATION TO THE INDIVIDUAL TERRORIST AT HAND INSTEAD OF SOCIETY ITSELF**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

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The argument that condoning torture in any circumstance will brutalize or dehumanize n29 the torturer or society in general is flawed because it takes an unduly narrow perspective of the proposal at hand and mischaracterizes the motivation for the proposal. It should be noted that this criticism is sometimes put as a stand alone argument, while on other occasions it is a premise of the slippery slope argument, along the lines that any torture will result in more torture because it will desensitize people to the suffering of others. We agree that inflicting pain on people is undesirable. In our view the reduction of pain should be one of the highest-order moral imperatives. But there is no basis for ranking one person's pain above that of another. When we are confronted with a situation where we must choose between who will bear unavoidable pain, we need to take a pain minimization approach. To this end, there is no question that causing even intense physical pain to a suspect results in less pain than allowing many people to be killed. The ensuing pain that would be felt by the relatives of the victims grossly outweighs the physical pain inflicted on the suspect. In assessing the potential dehumanizing aspect of a proposal, there is no logical or moral basis for focusing only on the interests of one agent in the dilemma. All affected parties must be given equal consideration. Sure speculative consequences (in this case the likelihood that the attack will be actually averted) weigh less than certain consequences (the pain inflicted on the suspect), but at some point the speculative side of the scales (where, for example, there are a large number of lives at stake) are so heavy that they outweigh certain negative consequences. The critics fail to extend their moral horizons beyond the interests of the suspect. This individualistic account of morality represents a far greater threat to our humanity than torturing suspects to save lives. A society that stood by and refused to take all reasonable steps to save innocent life would be vastly different than the one in which we currently live. Rescuers would not be permitted to push aside bystanders [\*715] for fear of bruising them, ambulances would not rush to save sick people for fear of colliding into other cars, police would not pursue criminals for the same reason, people would not undergo security checks at airports before they got onto planes because it would interfere with their right to liberty and privacy, and we would be content with stating what a pity it was that many innocent people were murdered in a possibly preventable incident on the basis that we did not want to subject a suspect to physical persuasion. This is approaching moral nihilism.



## **Harsh Interrogation of Terror Suspects Justified**

### **HARSHER INTERROGATION TECHNIQUES JUSTIFIED AGAINST TERROR SUSPECTS**

John T. Parry & Welsh S. White, **Law Professors-University of Pittsburgh, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 184

In some cases, of course, interrogators' use of standard interrogation techniques will not produce a statement. There is a small group of suspects—including professional criminals—who operate on the assumption that they will "say nothing" to the police. If law enforcement officials wish to obtain statements from suspects in this category, they will have to employ more extreme interrogation tactics than those permitted in ordinary criminal cases. If suspected terrorists are likely to fit within this category, then it may be necessary to consider what types of interrogation tactics have the best chance of securing information from individuals who are determined not to disclose it.

## **Harsh Interrogation of Terror Suspects Effective & Necessary**

### **INTELLIGENCE EXPERTS AGREE THAT TORTURE IS NECESSARY TO PREVENT TERRORISM**

**THIESSEN, 2009**, VISITING FELLOW AT THE HOOVER INSTITUTION AND SERVED IN SENIOR POSITIONS IN THE PENTAGON AND THE WHITE HOUSE FROM 2001 TO 2009 (MARC, "THE CIA'S QUESTIONING WORKED", APRIL 21, [HTTP://WWW.WASHINGTONPOST.COM/WP-DYN/CONTENT/ARTICLE/2009/04/20/AR2009042002818\\_PF.HTML](http://www.washingtonpost.com/wp-dyn/content/article/2009/04/20/AR2009042002818_pf.html))

Consider the Justice Department memo of May 30, 2005. It notes that "the CIA believes 'the intelligence acquired from these interrogations has been a key reason why al Qaeda has failed to launch a spectacular attack in the West since 11 September 2001.'" . . . In particular, the CIA believes that it would have been unable to obtain critical information from numerous detainees, including [Khalid Sheik Mohammed] and Abu Zubaydah, without these enhanced techniques." The memo continues: "Before the CIA used enhanced techniques . . . KSM resisted giving any answers to questions about future attacks, simply noting, 'Soon you will find out.' " Once the techniques were applied, "interrogations have led to specific, actionable intelligence, as well as a general increase in the amount of intelligence regarding al Qaeda and its affiliates." Specifically, interrogation with enhanced techniques "led to the discovery of a KSM plot, the 'Second Wave,' 'to use East Asian operatives to crash a hijacked airliner into' a building in Los Angeles." KSM later acknowledged before a military commission at Guantanamo Bay that the target was the Library Tower, the tallest building on the West Coast. The memo explains that "information obtained from KSM also led to the capture of Riduan bin Isomuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemmah Islamiyah cell tasked with executing the 'Second Wave.'" In other words, without enhanced interrogations, there could be a hole in the ground in Los Angeles to match the one in New York.

The memo notes that "[i]nterrogations of [Abu] Zubaydah -- again, once enhanced techniques were employed -- furnished detailed information regarding al Qaeda's 'organizational structure, key operatives, and modus operandi' and identified KSM as the mastermind of the September 11 attacks." This information helped the intelligence community plan the operation that captured KSM. It went on: "Zubaydah and KSM also supplied important information about al-Zarqawi and his network" in Iraq, which helped our operations against al-Qaeda in that country. All this confirms information that I and others have described publicly. But just as the memo begins to describe previously undisclosed details of what enhanced interrogations achieved, the page is almost entirely blacked out. The Obama administration released pages of unredacted classified information on the techniques used to question captured terrorist leaders but pulled out its black marker when it came to the details of what those interrogations achieved. Yet there is more information confirming the program's effectiveness. The Office of Legal Counsel memo states "we discuss only a small fraction of the important intelligence CIA interrogators have obtained from KSM" and notes that "intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of the [Counterterrorism Center's] reporting on al Qaeda." The memos refer to other classified documents -- including an "Effectiveness Memo" and an "IG Report," which explain how "the use of enhanced techniques in the interrogations of KSM, Zubaydah and others . . . has yielded critical information." Why didn't Obama officials release this information as well? Because they know that if the public could see the details of the techniques side by side with evidence that the program saved American lives, the vast majority would support continuing it.

### **FUTURE TERRORIST ATTACKS WILL CAUSE EXTINCTION**

**ALEXANDER**, DIRECTOR OF INTER-UNIVERSITY FOR TERRORISM STUDIES, **2003** [YONAH, WASHINGTON TIMES, AUGUST 28, LEXIS]

Last week's brutal suicide bombings in Baghdad and Jerusalem have once again illustrated dramatically that the international community failed, thus far at least, to understand the magnitude and implications of the terrorist threats to the very survival of civilization itself. Even the United States and Israel have for decades tended to regard terrorism as a mere tactical nuisance or irritant rather than a critical strategic challenge to their national security concerns. It is not surprising, therefore, that on September 11, 2001, Americans were stunned by the unprecedented tragedy of 19 al Qaeda terrorists striking a devastating blow at the center of the nation's commercial and military powers. Likewise, Israel and its citizens, despite the collapse of the Oslo Agreements of 1993 and numerous acts of terrorism triggered by the second intifada that began almost three years ago, are still "shocked" by each suicide attack at a time of intensive diplomatic efforts to revive the moribund peace process through the now revoked cease-fire arrangements [hudna]. Why are the United States and Israel, as well as scores of other countries affected by the universal nightmare of modern terrorism surprised by new terrorist "surprises"? There are many reasons, including misunderstanding of the manifold specific factors that contribute to terrorism's expansion, such as lack of a universal definition of terrorism, the religionization of politics, double standards of morality, weak punishment of terrorists, and the exploitation of the media by terrorist propaganda and psychological warfare. Unlike their historical counterparts, contemporary terrorists have introduced a new scale of violence in terms of conventional and unconventional

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threats and impact. The internationalization and brutalization of current and future terrorism make it clear we have entered an Age of Super Terrorism [e.g. biological, chemical, radiological, nuclear and cyber] with its serious implications concerning national, regional and global security concerns. Two myths in particular must be debunked immediately if an effective counterterrorism "best practices" strategy can be developed [e.g., strengthening international cooperation]. The first illusion is that terrorism can be greatly reduced, if not eliminated completely, provided the root causes of conflicts - political, social and economic - are addressed. The conventional illusion is that terrorism must be justified by oppressed people seeking to achieve their goals and consequently the argument advanced "freedom fighters" anywhere, "give me liberty and I will give you death," should be tolerated if not glorified. This traditional rationalization of "sacred" violence often conceals that the real purpose of terrorist groups is to gain political power through the barrel of the gun, in violation of fundamental human rights of the noncombatant segment of societies. For instance, Palestinians religious movements [e.g., Hamas, Islamic Jihad] and secular entities [such as Fatah's Tanzim and Aqsa Martyr Brigades] wish not only to resolve national grievances [such as Jewish settlements, right of return, Jerusalem] but primarily to destroy the Jewish state. Similarly, Osama bin Laden's international network not only opposes the presence of American military in the Arabian Peninsula and Iraq, but its stated objective is to "unite all Muslims and establish a government that follows the rule of the Caliphs." The second myth is that strong action against terrorist infrastructure [leaders, recruitment, funding, propaganda, training, weapons, operational command and control] will only increase terrorism. The argument here is that law-enforcement efforts and military retaliation inevitably will fuel more brutal acts of violent revenge. Clearly, if this perception continues to prevail, particularly in democratic societies, there is the danger it will paralyze governments and thereby encourage further terrorist attacks. In sum, past experience provides useful lessons for a realistic future strategy. The prudent application of force has been demonstrated to be an effective tool for short- and long-term deterrence of terrorism. For example, Israel's targeted killing of Mohammed Sider, the Hebron commander of the Islamic Jihad, defused a "ticking bomb." The assassination of Ismail Abu Shanab - a top Hamas leader in the Gaza Strip who was directly responsible for several suicide bombings including the latest bus attack in Jerusalem - disrupted potential terrorist operations. Similarly, the U.S. military operation in Iraq eliminated Saddam Hussein's regime as a state sponsor of terror. Thus, it behooves those countries victimized by terrorism to understand a cardinal message communicated by Winston Churchill to the House of Commons on May 13, 1940: "Victory at all costs, victory in spite of terror, victory however long and hard the road may be: For without victory, there is no survival. "

#### **US TORTURE PROGRAMS HAVE EMPIRICALLY WORKED AT GETTING NEEDED INTELLIGENCE AGAINST TERRORISTS**

**MARTINEZ**, ABC NEWS STAFF WRITER, **2009** [LUIS, "CIA DIRECTOR'S STRONG DEFENSE OF INTERROGATION TECHNIQUES", JANUARY 15 [HTTP://BLOGS.ABCNEWS.COM/POLITICALRADAR/2009/01/CIA-DIRECTORS-S.HTML](http://blogs.abcnews.com/politicalradar/2009/01/cia-directors-s.html)]

ABC News' Luis Martinez reports: CIA Director Michael Hayden offered a spirited defense of the agency's controversial detention and interrogation techniques, such as waterboarding, which Attorney General nominee Eric Holder characterized today as "torture." Hayden said the techniques provided extremely useful information about al Qaeda and have led to repeated successes against the terror network. "You can't say it didn't work. It worked," Hayden said in a wide-ranging farewell interview with reporters at the CIA's headquarters in Langley, Va. Hayden said the legality of waterboarding and other enhanced interrogation techniques is an "uninteresting question to the CIA" right now because the agency has not engaged in the practices since March 2003. "We don't do that. We haven't done in it since March 2003. We have no intent to do it," said Hayden. He added that given the new legal climate since the passage of the Military Commission Act and the Detainee Treatment Act, "I wouldn't know what kind of answer I'd get from the Justice Department, were I to ask. But we haven't asked." Hayden was not CIA Director at the time that the enhanced techniques were legally authorized for use at secret CIA prisons, but he offered a strong defense nonetheless. "I am convinced that the program got the maximum amount of information. Particularly out of that first generation of detainees." Referring to 9-11plotter Khalid Sheikh Mohammed and al Qaeda financier Abu Zubaydah, Hayden said he couldn't conceive of another way for them to have provided useful intelligence, "given their character and given their commitment to what it is they do."

#### **TORTURE IS EFFECTIVE – USES HUMAN DESIRE TO AVOID PAIN**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005** [MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

The main benefit of torture is that it is an excellent means of gathering information. Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of

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a torturer to avoid the pain. Often even the threat of torture alone will [\*589] evoke cooperation. To this end, Dershowitz cites a recent kidnapping case in Germany in which the son of a distinguished banker was kidnapped. n33 The eleven-year-old boy had been missing for three days. The police had in their custody a man they were convinced had perpetrated the kidnapping. The man was taken into custody after being seen collecting a ransom that was paid by the boy's family. n34 During seven hours of interrogation the man "toyed" with police, leading them to one false location after another. n35 After exhausting all lawful means of interrogation, the deputy commissioner of the Frankfurt police instructed his officers, in writing, that they could try to extract information "by means of the infliction of pain, under medical supervision and subject to prior warning." n36 Ten minutes after the warning was given the suspect told the police where the boy was; unfortunately the boy was already dead, having been killed shortly after the kidnapping. n37

#### **THE VAST PREPONDERANCE OF EMPIRICAL AND HISTORICAL EVIDENCE SUGGESTS THAT TORTURE IS EFFECTIVE AT GETTING INFORMATION**

**BAGARIC, HEAD OF DEAKIN LAW SCHOOL AND CLARKE, LECTURER AT DEAKIN LAW SCHOOL, 2005 [MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]**

Despite the crude nature of previous incidents of torture (thereby making accurate information virtually impossible to obtain), there is no question that sometimes torture can be effective at eliciting [\*717] information, and it can save innocent lives. n35 This is a point accepted by most of the critics. n36 For example, Israeli authorities claim to have foiled ninety terrorist attacks by using coercive interrogation. n37 It is also claimed that information provided as a result of torture enabled the French to foil terrorist attacks in the Algiers. n38 One of the people doing the torturing in the Algiers was General Paul Aussaresses. In his book he cites "a string of instances in which he was able to find bombs and break up terrorist cells as a result of torture. He claims that he quickly discovered that 'the best way to make a terrorist talk when he refused to say what he knew was to torture him.'" n39 An aide to United States President George W. Bush recently noted that "torture light" is an essential tool: "We're talking about the most successful intelligence gained in the war on terror coming from these programs," he says. Details are hard to come by, but Sen. Kit Bond, a member of the Senate intelligence committee, [said] ... that "enhanced interrogation techniques" worked with at least one high-level Qaeda operative, 9/11 mastermind Khalid Shaikh Mohammed, to thwart a plot. Bond would not say which one, but among foiled plots vaguely described by the White House and linked to "KSM" was a scheme to attack targets on the West Coast of the United States with hijacked airlines. The planning for such a "second wave" attack may have been in the early stages. n40 Further, a United States investigator, Chris Mackey, who went to Afghanistan to question al-Qaeda suspects following the United States invasion in 2001 has commented that effective interrogation is not possible without the use of torture. n41 According to Mackey, under the international definition of torture, any effective form of interrogation is perceived as torture and thus prohibited. n42 [\*718] Alasdair Palmer also notes that, in 1995, the Philippines intelligence service provided information obtained through torture to America that helped foil an al-Qaeda plan to crash eleven airplanes carrying 4000 people into the ocean and to crash a small aircraft filled with explosives into Central Intelligence Agency ("CIA") headquarters. n43 Marcy Strauss gives the example of famous terrorist Abu Nidel who was "broken" by Jordanian officials, and the 1993 World Trade Center bombings that were cracked by the Philippines when they threatened to torture a suspect. n44

#### **A KEY CIA INTELLIGENCE REPORT DEMONSTRATES THE EFFECTIVENESS OF TORTURE**

**LOWRY, EDITOR OF NATIONAL REVIEW AND A SYNDICATED COLUMNIST, 2009 [RICH, "YES, HARSH INTERROGATIONS WORK", NATIONAL REVIEW, SEP 1ST, [HTTP://ARTICLE.NATIONALREVIEW.COM/PRINT/?Q=OTHMYTA5YWExOGJKOWY4ODM3YzYWNmM5OwVlNzG4ZTC=](http://article.nationalreview.com/print/?q=OTHMYTA5YWExOGJKOWY4ODM3YzYWNmM5OwVlNzG4ZTC=)]**

If Dick Cheney had a fantasy scenario for how the Bush administration interrogation program worked, it might go like this: A top-level al-Qaeda operative is captured, but resists traditional interrogation. He is then waterboarded, after which he becomes an invaluable resource. Eventually, the terrorist conducts tutorials on al-Qaeda doctrine and operations for the benefit of American intelligence officers. Except it's not a fable. It describes the course of 9/11 mastermind Khalid Sheikh Mohammed's post-capture career, according to the Washington Post. The Post report, together with CIA documents released during the past week, demolishes a key argument of opponents of so-called enhanced interrogation techniques — that "torture" never works."

This contention always betrayed an insecurity. For all their thundering about the criminal immorality of coercive interrogations, opponents never dared admit that they could have elicited important, perhaps lifesaving, information. They treated it as a kind of metaphysical impossibility.

In so doing, they left a hostage to fortune. They had to hope that Cheney was wrong when he said that classified documents proved the effectiveness of the interrogations, and failing that, had to hope the documents would never be declassified. On this

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front, the release of the 2004 Central Intelligence Agency inspector general report — declassified thanks to an American Civil Liberties Union lawsuit — has been a disaster for them. In the intelligence business, it's called blowback.

## No Solvency for Torture

**TORTURE AND VIOLENT INTERROGATION ARE INEVITABLE WITHOUT UNDERSTANDING THE JUSTIFICATIONS BEHIND A COUNTRY'S DECISION TO EMPLOY IT.**

**LEDWIDGE AND OPPENHEIM**, LEDWIDGE IS THE ANTI-TORTURE FOCAL POINT FOR THE OFFICE OF DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS OF THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE AND OPPENHEIM IS A JD CANDIDATE AT BOSTON UNIVERSITY SCHOOL OF LAW, 2006 [FRANK AND LUCAS, "ISSUES AND POLICY: PREVENTING TORTURE: REALITIES AND PERCEPTIONS," THE FLETCHER FORUM OF WORLD AFFAIRS JOURNAL, WINTER]

In human rights literature there is, to say the least, insufficient examination of why these countries do not have torture.

What makes them different? Why do some countries regularly use torture as an instrument of interrogation in criminal cases while others do not? One uncomfortable truth is that the laws in countries not employing torture are not any better, but rather that those countries' existing laws are actually being observed and enforced. n11 Examination reveals that nontorturing countries have several working mechanisms, such as procedural rules and judicial oversight, that torturing countries do not have. Again, interrogatory torture is not a disembodied evil, but is instead an almost necessary consequence of systemic failures common to nearly all torturing countries. The primary solution to the problem of torture is therefore not to throw money and effort at drafting expensive legislation to be adopted by countries with no intent to enforce it (the "boutique" approach sometimes espoused by the international community), but to address reality and remove the very real incentives for torture as an aid to interrogation (the approach of the OSCE Office of Democratic Institutions and Human Rights). n12 This approach requires that opponents of torture understand how good legal systems work and apply that understanding to countries that use torture. In order to apply workable preventative measures, proponents of torture prevention must be deeply aware of what is termed a "best practice" in countries where torture or ill-treatment is no longer a major problem, such as the United Kingdom, Germany, and Sweden. Equally, the question of how to deal with torture in offending countries requires a practical understanding of how offending systems actually work.

[\*168] The authors submit that this failure to look at why torture happens in some places and why it does not in others simply ignores reality. In this article we contend that the discourse on torture in the human rights community must change to look less at what should be in favor of examining what is. We therefore ask how torturers think and why they torture, in order to reach the question of what can be done to stop them.

WHY DO PEOPLE TORTURE?

When we compare countries where torture is systematic to those where it is rare or nonexistent, we see that most torture takes place in defined circumstances for known reasons: where there are incentives to torture and there is no danger of punishment for torturing, we can expect torture to occur.

The standard dynamic of torture is not the alleged terrorist being interrogated by detectives or intelligence agents; it is the suspected burglar or car thief being beaten so that he will confess to the crime of which he is accused. Investigators all too frequently have every incentive to apply such pressure and, more importantly, no incentive not to do so.

The Incentive to Win Convictions

Police often have a reward structure based upon the number of convictions or cases solved, while failure to solve cases will certainly not assist with career progression and could indeed lead to reprimand or demotion. n13 Systems that produce torture typically rely on confessions rather than extensive evidence-based proceedings to convict the accused. n14 Investigators may not have the necessary skills and resources to collect evidence and conduct an investigation. Forcing a confession is, in any case, an effective shortcut to conviction; the incentive to win convictions, absent preventative measures and disincentives to torture, promotes extracting confessions by force because it is easier to accomplish than using other kinds of police procedures.

[\*169] Impunity from Punishment for Using Torture

Where the use of torture is endemic, there is often high-level approval or acceptance of torture as a method of investigation and intimidation. It is often used to discourage political opposition and otherwise protect undemocratic regimes. Meanwhile, it is clear to investigators in these countries that there is little threat of punishment for using torture; the consequences of a complaint of torture in the standard model are more likely to negatively affect the complainant than the perpetrator. n15 Detention systems are hidden from public view, interrogations are unrecorded, and arrestees are rarely, if ever, given prompt access to a doctor or lawyer; thus little evidence of abuse during interrogation is preserved, making prosecution (and proof) more difficult.

## **Extraordinary Rendition Turn: Link**

### **EXTENDING DUE PROCESS PROTECTIONS TO INTERROGATING FOREIGN TERROR SUSPECTS ENCOURAGES RENDITIONS TO THIRD PARTIES**

M. Katherine B. Darmer, Law Professor, Chapman University, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 218-9

Without a foreign interrogation exception, American agents investigating terrorism may be forced to choose between intelligence gathering in the broad interests of preventing future attacks and evidence fathering for the purpose of bringing criminals to justice. This is an untenable dilemma. In the name of upholding purported constitutional rights, American agents may have a perverse incentive to turn suspected terrorists over to foreign agents, who may be under no constraints regarding the use of physical force or brutality, rather than risk the exclusion of non-Mirandized statements taken by American law enforcement representatives. In such a case, the prophylactic goals of *Miranda* backfire, although the Fifth Amendment itself poses no such dilemma.

### **REFORMING GITMO CAUSES GOVERNMENT TO SHIFT PRISONERS TO OTHER COUNTRIES**

Indo-Asian News Service, 2005, ("Us To Release Three Guantanamo Detainees," 3/13, L/N)

The Pentagon was reportedly seeking to cut by more than half the detainee population at Guantanamo, in part by transferring hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen, after the US Supreme Court ruled last June that the prisoners could challenge their detentions in federal courts in America.

### **THE REGIME OF TORTURE IMPLEMENTED IN THE NAME OF THE WAR ON TERROR HAS NOT ENDED WITH THE BUSH ADMINISTRATION—AS GUANTANAMO IS BEING CLOSED, NEW DARK SITES SUCH AS THE SECRET PRISONS AT BAGRAM AIRBASE IN AFGHANISTAN ARE BEING CREATED OUTSIDE ALL REGIMES OF LEGALITY**

GEBAUER ET AL., JOURNALIST AT DER SPIEGEL, 2009 [MATTHIAS, JOHN, BRITTA, "PRISONER ABUSE CONTINUES AT BAGRAM PRISON IN AFGHANISTAN," 9/21,

[HTTP://WWW.SPIEGEL.DE/INTERNATIONAL/WORLD/0,1518,650242,00.HTML](http://www.spiegel.de/international/world/0,1518,650242,00.html)]

Bagram is "the forgotten second Guantanamo," says American military law expert Eugene Fidell, a professor at Yale Law School. "But apparently there is a continuing need for this sort of place even under the Obama administration."

From the beginning, "Bagram was worse than Guantanamo," says New York-based attorney Tina Foster, who has argued several cases on behalf of detainee rights in US courts. "Bagram has always been a torture chamber."

And what does Obama say? Nothing. He never so much as mentions Bagram in any of his speeches. When discussing America's mistreatment of detainees, he only refers to Guantanamo.

Classified Location

The Bagram detention facility, by now the largest American military prison outside the United States, is not marked on any maps. In fact, its precise location, somewhere on the periphery of the giant air base northeast of the Afghan capital, is classified. It comprises two sand-colored buildings that resemble airplane hangars, surrounded by tall concrete walls and green camouflage tarps. The facility was set up in 2002 as a temporary prison on the grounds of a former Soviet air base.

Today, the two buildings contain large cages, each with the capacity to hold 25 to 30 prisoners. Up to 1,000 detainees can be held at Bagram at any one time. The detainees sleep on mats, and there is one toilet behind a white curtain for each cage. A \$60 million extension is expected to be completed by the end of the year.

Unlike Guantanamo, Bagram is located in the middle of the Afghan war zone. But not all the inmates were captured in combat areas. Many terrorism suspects are from other countries and were transported to Bagram for interrogation after being captured. Since the military prison first came into operation, all the detainees there have been classified as "enemy combatants" rather than prisoners of war, which would make them subject to the provisions of the Geneva Convention.

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Bagram's most prominent temporary detainee to date was Khalid Sheikh Mohammed, the self-proclaimed chief architect of the Sept. 11, 2001 terrorist attacks. After his arrest in Pakistan, Mohammed was initially taken to Bagram for three days and was then held at a secret prison in Poland before being flown to Guantanamo. He told representatives of the Red Cross that he was beaten in Afghanistan, suspended from shackles attached to his hands and sexually humiliated. "I was made to lie on the floor," he said. "A tube was inserted into my anus and water poured inside."

"In my view, having visited Guantanamo several times, the Bagram facility made Guantanamo look like a nice hotel," says military prosecutor Stuart Couch, who was given access to the interior of both facilities. "The men did not appear to be allowed to move around at will, they mostly sat in rows on the floor. It smelled like the "monkey house" at the zoo."

Sleep Deprivation and Sexual Humiliation

From the beginning, Bagram was notorious for the brutal forms of torture employed there. Former inmates report incidents of sleep deprivation, beatings and various forms of sexual humiliation. In some cases, an interrogator would place his penis along the face of the detainee while he was being questioned. Other inmates were raped with sticks or threatened with anal sex.

Omar Khadr, a Canadian inmate who was 15 at the time, says military personnel used him as a living mop. "Military police poured pine oil on the floor and on me. And then, with me lying on my stomach with my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor."

At least two men died during imprisonment. One of them, a 22-year-old taxi driver named Dilawar, was suspended by his hands from the ceiling for four days, during which US military personnel repeatedly beat his legs. Dilawar died on Dec. 10, 2002. In the autopsy report, a military doctor wrote that the tissue on his legs had basically been "pulpified." As it happens, his interrogators had already known -- and later testified -- that there was no evidence against Dilawar.

According to an internal military investigation of the prisoner abuse cases at Abu Ghraib prison in Iraq, which triggered worldwide outrage when it became public in 2004, the practices there were inspired by the treatment of inmates at Bagram.

Hundreds of Innocent Inmates

To this day, there are hardly any photos from inside Bagram, and journalists have never been given access to the detention center. Although exact numbers are unknown, there are believed to be about 600 detainees at Bagram, or close to three times as many as there currently are at Guantanamo. According to an as-yet-unpublished 2009 Pentagon report, 400 of the Bagram inmates are innocent and could be released immediately.

The detainees at Bagram still have no right to an attorney, which means that they have no legal recourse against their imprisonment and no opportunity to testify in their cases. Some have been there for years, without knowing why.



## Badiou K

**THE AFF REPRESENTS AN IMAGE OF TORTURE AS THE ULTIMATE MORAL EVIL, BUT THAT FORECLOSES THE HORIZON OF POLITICAL POSSIBILITY BECAUSE WE ACCEPT THE STATUS QUO AS THE BEST WE'VE GOT, ALLOWING LIMITLESS VIOLENCE TO CONTINUE.**

**BADIOU ET AL.**, FORMER CHAIR OF PHILOSOPHY AT THE ÉCOLE NORMALE SUPÉRIEURE, **2002**, [ALAIN, CHRISTOPHER COX AND MOLLY WHALEN, JOURNALISTS FOR CABINET "ON EVIL: AN INTERVIEW WITH ALAIN BADIOU", ISSUE 5 EVIL, WINTER 2001/02

[HTTP://WWW.CABINETMAGAZINE.ORG/ISSUES/5/ALAINBADIOU.PHP](http://www.cabinetmagazine.org/issues/5/alainbadiou.php), (CL)]

The idea of the self-evidence of Evil is not, in our society, very old. It dates, in my opinion, from the end of the 1960s, when the big political movement of the 60s was finished. We then entered into a reactive period, a period that I call the Restoration. You know that, in France, "Restoration" refers to the period of the return of the King, in 1815, after the Revolution and Napoleon. We are in such a period. Today we see liberal capitalism and its political system, parliamentarianism, as the only natural and acceptable solutions. Every revolutionary idea is considered utopian and ultimately criminal. We are made to believe that the global spread of capitalism and what gets called "democracy" is the dream of all humanity. And also that the whole world wants the authority of the American Empire, and its military police, NATO.

In truth, our leaders and propagandists know very well that liberal capitalism is an inegalitarian regime, unjust, and unacceptable for the vast majority of humanity. And they know too that our "democracy" is an illusion: Where is the power of the people? Where is the political power for third world peasants, the European working class, the poor everywhere?

We live in a contradiction: a brutal state of affairs, profoundly inegalitarian—where all existence is evaluated in terms of money alone—is presented to us as ideal. To justify their conservatism, the partisans of the established order cannot really call it ideal or wonderful. So instead, they have decided to say that all the rest is horrible. Sure, they say, we may not live in a condition of perfect Goodness. But we're lucky that we don't live in a condition of Evil. Our democracy is not perfect. But it's better than the bloody dictatorships. Capitalism is unjust. But it's not criminal like Stalinism. We let millions of Africans die of AIDS, but we don't make racist nationalist declarations like Milosevic. We kill Iraqis with our airplanes, but we don't cut their throats with machetes like they do in Rwanda, etc.

That's why the idea of Evil has become essential. No intellectual will actually defend the brutal power of money and the accompanying political disdain for the disenfranchised, or for manual laborers, but many agree to say that real Evil is elsewhere. Who indeed today would defend the Stalinist terror, the African genocides, the Latin American torturers? Nobody. It's there that the consensus concerning Evil is decisive. Under the pretext of not accepting Evil, we end up making believe that we have, if not the Good, at least the best possible state of affairs—even if this best is not so great. The refrain of "human rights" is nothing other than the ideology of modern liberal capitalism: We won't massacre you, we won't torture you in caves, so keep quiet and worship the golden calf. As for those who don't want to worship it, or who don't believe in our superiority, there's always the American army and its European minions to make them be quiet. Note that even Churchill said that democracy (that is to say the regime of liberal capitalism) was not at all the best of political regimes, but rather the least bad. Philosophy has always been critical of commonly held opinions and of what seems obvious. Accept what you've got because all the rest belongs to Evil is an obvious idea, which should therefore be immediately examined and critiqued. My personal position is the following: It is necessary to examine, in a detailed way, the contemporary theory of Evil, the ideology of human rights, the concept of democracy. It is necessary to show that nothing there leads in the direction of the real emancipation of humanity. It is necessary to reconstruct rights, in everyday life as in politics, of Truth and of the Good. Our ability to once again have real ideas and real projects depends on it.

**TORTURE AND TERROR ARE NOT OBJECTIVE EVILS, BUT POLITICAL INSTRUMENTS THAT HAVE EXISTED SINCE THE DAWN OF HUMANITY.**

**BADIOU ET AL.**, FORMER CHAIR OF PHILOSOPHY AT THE ÉCOLE NORMALE SUPÉRIEURE, **2002**, [ALAIN, CHRISTOPHER COX AND MOLLY WHALEN, JOURNALISTS FOR CABINET "ON EVIL: AN INTERVIEW WITH ALAIN BADIOU", ISSUE 5 EVIL, WINTER 2001/02

[HTTP://WWW.CABINETMAGAZINE.ORG/ISSUES/5/ALAINBADIOU.PHP](http://www.cabinetmagazine.org/issues/5/alainbadiou.php), (CL)]

My position is obviously that this "reasoning" is purely illusory ideology. First, liberal capitalism is not at all the Good of humanity. Quite the contrary; it is the vehicle of savage, destructive nihilism. Second, the Communist revolutions of the 20th century have represented grandiose efforts to create a completely different historical and political universe. Politics is

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not the management of the power of the State. Politics is first the invention and the exercise of an absolutely new and concrete reality. Politics is the creation of thought. The Lenin who wrote What is to be Done?, the Trotsky who wrote History of the Russian Revolution, and the Mao Zedong who wrote On the Correct Handling of Contradictions Among the People are intellectual geniuses, comparable to Freud or Einstein. Certainly, the politics of emancipation, or egalitarian politics, have not, thus far, been able to resolve the problem of the power of the State. They have exercised a terror that is finally useless. But that should encourage us to pick up the question where they left it off, rather than to rally to the capitalist, imperialist enemy. Third, the category "totalitarianism" is intellectually very weak. There is, on the side of Communism, a universal desire for emancipation, while on the side of Fascism, there is a national and racial desire. These are two radically opposed projects. The war between the two has indeed been the war between the idea of a universal politics and the idea of racial domination. Fourth, the use of terror in revolutionary circumstances or civil war does not at all mean that the leaders and militants are insane, or that they express the possibility of internal Evil. Terror is a political tool that has been in use as long as human societies have existed. It should therefore be judged as a political tool, and not submitted to infantilizing moral judgment. It should be added that there are different types of terror. Our liberal countries know how to use it perfectly. The colossal American army exerts terrorist blackmail on a global scale, and prisons and executions exert an interior blackmail no less violent. Fifth, the only coherent theory of the subject (mine, I might add, in jest!) does not recognize in it any particular disposition toward Evil. Even Freud's death drive is not particularly tied to Evil. The death drive is a necessary component of sublimation and creation, just as it is of murder and suicide. As for the love of the Other, or, worse, the "recognition of the Other," these are nothing but Christian confessions. There is never "the Other" as such. There are projects of thought, or of actions, on the basis of which we distinguish between those who are friends, those who are enemies, and those who can be considered neutral. The question of knowing how to treat enemies or neutrals depends entirely on the project concerned, the thought that constitutes it, and the concrete circumstances (is the project in an escalating phase? is it very dangerous? etc.).

**WE SHOULD AFFIRM A POLITICS OF THE FIDELITY TO THE EVENT – WE SHOULD BE WILLING TO FIGHT FOR SOMETHING, FIGHT FOR THE GOOD. ONLY THEN CAN WE RECOGNIZE THE VIOLENCE ACROSS THE GLOBE IS NOT EVIL, BUT STRAYS FROM THE ETERNAL TRUTH OF EQUALITY.**

**BADIOU ET AL.,** FORMER CHAIR OF PHILOSOPHY AT THE ÉCOLE NORMALE SUPÉRIEURE, **2002**, [ALAIN, CHRISTOPHER COX AND MOLLY WHALEN, JOURNALISTS FOR CABINET "ON EVIL: AN INTERVIEW WITH ALAIN BADIOU", ISSUE 5 EVIL, WINTER 2001/02

[HTTP://WWW.CABINETMAGAZINE.ORG/ISSUES/5/ALAINBADIOU.PHP](http://www.cabinetmagazine.org/issues/5/alainbadiou.php), (CL)]

Were I to reverse the tables, as you suggest, I would leave everything in place. To say that liberal capitalism is Evil would not change anything. I would still be subordinating politics to humanistic and Christian morality: I would say: "Let's fight against Evil." But I've had enough of "fighting against," of "deconstructing," of "surpassing," of "putting an end to," etc. My philosophy desires affirmation. I want to fight for; I want to know what I have for the Good and to put it to work. I refuse to be content with the "least evil." It is very fashionable right now to be modest, not to think big. Grandeur is considered a metaphysical evil. Me, I am for grandeur, I am for heroism. I am for the affirmation of the thought and the deed.

Certainly, it is necessary to propose another theory of Evil. But that is to say, essentially, another theory of the Good. Evil would be to compromise on the question of the Good. To give up is always Evil. To renounce liberation politics, renounce a passionate love, renounce an artistic creation.... Evil is the moment when I lack the strength to be true to the Good that compels me.

The real question underlying the question of Evil is the following: What is the Good? All my philosophy strives to answer this question. For complex reasons, I give the Good the name "Truths" (in the plural). A Truth is a concrete process that starts by an upheaval (an encounter, a general revolt, a surprising new invention), and develops as fidelity to the novelty thus experimented. A Truth is the subjective development of that which is at once both new and universal. New: that which is unforeseen by the order of creation. Universal: that which can interest, rightly, every human individual, according to his pure humanity (which I call his generic humanity). To become a subject (and not remain a simple human animal), is to participate in the coming into being of a universal novelty. That requires effort, endurance, sometimes self-denial. I often say it's necessary to be the "activist" of a Truth. There is Evil each time egoism leads to the renunciation of a Truth. Then, one is de-subjectivized. Egoistic self-interest carries one away, risking the interruption of the whole progress of a truth (and thus of the Good).

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One can, then, define Evil in one phrase: Evil is the interruption of a truth by the pressure of particular or individual interests. Even the case that you cite above—the woman who drowns her five infants—springs from this vision of things. The debate you raise is absurd: Obviously, everyone is "capable" of everything. One has seen everywhere good people becoming torturers, or peaceful citizens brutalizing people over insignificant things. This consideration is of no interest. It only reminds us that the human species is an animal species, governed by the lowest interests, of which moreover capitalist profit is merely the legal formalization. All that is short of Good and Evil, it is nothing more than the rule of impulses. The question of Evil starts when one can say what Good one is talking about. I am convinced that the murder of five children is actually tied to a brutal renunciation of the Good, in the form of a love process. In any case, that's the only case in which it makes any sense to speak of Evil. The myth that one thinks of is Medea. She also kills her children. And it's not Evil, in the tragic sense of the term, because this murder is entirely dependent on her love for Jason.

In your view, then, is the realm of the human animal simply beneath good and evil (such that acts of torture, for example, are not properly "evil")? Does one not have a moral obligation to become a subject (instead of remaining a human animal)? And, thus, is one's failure to become a subject not a moral failure?

The question actually combines two common conceptions of morality (and thus of the distinction between Good and Evil): the "natural" conception, derived from Rousseau, and the "formal" conception, derived from Kant:

1. There is a "natural" morality, things that are obviously bad in the opinion of any human consciousness. Accordingly, Evil exists for the human animal. The example given is that of torture.
2. There is a "formal" morality, a universal obligation that is above any particular situation. And therefore there is a universal Evil, which, too, is independent of circumstances. The example given is that of the obligation to become a subject, to place oneself above the basic human animalism. It is bad to refuse to become a fully human subject, no matter what might be the particular terms of this becoming.

I must, of course, specify that I am absolutely opposed to these two conceptions. I maintain that the natural state of the human animal has nothing to do with Good or Evil. And I maintain that the kind of formal moral obligation described in Kant's categorical imperative does not actually exist. Take the example of torture. In a civilization as sophisticated as the Roman Empire, not only is torture not considered an Evil, it is actually appreciated as a spectacle. In arenas, people are devoured by tigers; they are burned alive; the audience rejoices to see combatants cut each other's throats. How, then, could we think that torture is Evil for every human animal? Aren't we the same animal as Senecca or Marcus Aurelius? I should add that the armed forces of my country, France, with the approval of the governments of the era and the majority of public opinion, tortured all the prisoners during the Algerian War. The refusal of torture is a historical and cultural phenomenon, not at all a natural one. In a general way, the human animal knows cruelty as well as it knows pity; the one is just as natural as the other, and neither one has anything to do with Good or Evil. One knows of crucial situations where cruelty is necessary and useful, and of other situations where pity is nothing but a form of contempt for others. You won't find anything in the structure of the human animal on which to base the concept of Evil, nor, moreover, that of the Good.

But the formal solution isn't any better. Indeed, the obligation to be a subject doesn't have any meaning, for the following reason: The possibility of becoming a subject does not depend on us, but on that which occurs in circumstances that are always singular. The distinction between Good and Evil already supposes a subject, and thus can't apply to it. It's always for a subject, not a pre-subjectivized human animal, that Evil is possible. For example, if, during the occupation of France by the Nazis, I join the Resistance, I become a subject of History in the making. From the inside of this subjectivization, I can tell what is Evil (to betray my comrades, to collaborate with the Nazis, etc.). I can also decide what is Good outside of the habitual norms. Thus the writer Marguerite Duras has recounted how, for reasons tied to the resistance to the Nazis, she participated in acts of torture against traitors. The whole distinction between Good and Evil arises from inside a becoming-subject, and varies with this becoming (which I myself call philosophy, the becoming of a Truth). To summarize: There is no natural definition of Evil; Evil is always that which, in a particular situation, tends to weaken or destroy a subject. And the conception of Evil is thus entirely dependent on the events from which a subject constitutes itself. It is the subject who prescribes what Evil is, not a natural idea of Evil that defines what a "moral" subject is. There is also no formal imperative from which to define Evil, even negatively. In fact, all imperatives presume that the subject of the imperative is already constituted, and in specific circumstances. And thus there can be no imperative to become a subject, except as an absolutely vacuous statement. That is also why there is no general form of Evil, because Evil does not exist except as a judgment made, by a subject, on a situation, and on the consequences of his own actions in this situation. So the same act (to kill, for example) may be Evil in a certain subjective context, and a necessity of the Good in another.

I must particularly insist that the formula "respect for the Other" has nothing to do with any serious definition of Good and Evil. What does "respect for the Other" mean when one is at war against an enemy, when one is brutally left by a woman for someone else, when one must judge the works of a mediocre "artist," when science is faced with obscurantist sects,

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etc.? Very often, it is the "respect for Others" that is injurious, that is Evil. Especially when it is resistance against others, or even hatred of others, that drives a subjectively just action. And it's always in these kinds of circumstances (violent conflicts, brutal changes, passionate loves, artistic creations) that the question of Evil can be truly asked for a subject. Evil does not exist either as nature or as law. It exists, and varies, in the singular becoming of the True.

In response to an earlier question, you remarked that "[i]t is necessary to reconstruct rights, in everyday life as in politics, of Truth and of the Good." Can you say more about how the ethic of truths might get mobilized in practical terms, and how this might constitute an alternative to the current conception of "human rights"?

Take the nearest example: the terrible criminal attack in New York in September, with its thousands of casualties. If you reason in terms of the morality of human rights, you say, with President Bush: "These are terrorist criminals. This is a struggle of Good against Evil." But are Bush's policies, in Palestine or Iraq for example, really Good? And, in saying that these people are Evil, or that they don't respect human rights, do we understand anything about the mindset of those who killed themselves with their bombs? Isn't there a lot of despair and violence in the world caused by the fact that the politics of Western powers, and of the American government in particular, are utterly destitute of ingenuity and value? In the face of crimes, terrible crimes, we should think and act according to concrete political Truths, rather than be guided by the stereotypes of any sort of morality. The whole world understands that the real question is the following: Why do the politics of the Western powers, of NATO, of Europe and the USA, appear completely unjust to two out of three inhabitants of the planet? Why are five thousand American deaths considered a cause for war, while five hundred thousand dead in Rwanda and a projected ten million dead from AIDS in Africa do not, in our opinion, merit outrage? Why is the bombardment of civilians in the US Evil, while the bombardment of Baghdad or Belgrade today, or that of Hanoi or Panama in the past, is Good? The ethic of Truths that I propose proceeds from concrete situations, rather than from an abstract right, or a spectacular Evil. The whole world understands these situations, and the whole world can act in a disinterested fashion prompted by the injustice of these situations. Evil in politics is easy to see: It's absolute inequality with respect to life, wealth, power. Good is equality. How long can we accept the fact that what is needed for running water, schools, hospitals, and food enough for all humanity is a sum that corresponds to the amount spent by wealthy Western countries on perfume in a year? This is not a question of human rights and morality. It is a question of the fundamental battle for equality of all people, against the law of profit, whether personal or national.

## **AT: “Slippery Slope”**

### **SLIPPERY SLOPE DOES NOT APPLY TO TORTURE – IT IS ALREADY USED WORLDWIDE AND IS IN THE INTEREST OF SOCIETY AS A WHOLE**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

The obvious counter to this is the slippery slope argument. "If you start opening the door, making a little exception here, a little exception there, you've basically sent the signal that the ends justify the means," resulting in even more torture. n132 The slippery slope argument is often invoked in relation to acts that in themselves are justified, but which have similarities with objectionable practices, and urges that in morally appraising an action we must not only consider its intrinsic features but also the likelihood of it being used as a basis for condoning similar, but in fact relevantly different undesirable practices. n133 The slippery slope argument in the context of torture holds that while torture might be justified in the extreme cases, legalizing it in these circumstances will invariably lead to torture in other less desperate situations.

This argument is not sound in the context of torture. First, the floodgates are already open - torture is widely used, despite the absolute legal prohibition against it. It is, in fact, arguable that it is the existence of an unrealistic absolute ban on torture that has driven torture "beneath the radar screen of accountability" n134 and that the legalization of torture in very rare circumstances would, in fact, reduce the instances of torture because of the increased level of accountability. n135

Second, there is no evidence to suggest that the lawful violation of fundamental human interests will necessarily lead to a violation of fundamental rights where the pre-conditions for the activity are clearly delineated and controlled. Thus, in the United States the use of the death penalty has not resulted in a gradual extension of the offenses for which people may be executed or an erosion in the respect for human life. Third, promulgating the message that the "means justifies the ends [sometimes]" is not inherently undesirable. Debate can then focus on the precise means and ends that are justifiable.

### **NO SLIPPERY SLOPE BECAUSE THE FRAMEWORK FOR US TORTURE IS BASED ON SAVING INNOCENT LIVES**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

The slippery slope argument, though probably the most common criticism of our proposal, is the easiest to rebut.

Sometimes there are no slippery slopes or wedges with thin parts to be found - not even a trickle behind the floodgates. Such is the case with our proposal to legalize lifesaving torture. There is no evidence to suggest that an institutionalized practice of inflicting pain on one person to save another or for the common good will lead to abuses. Capital punishment and kidney and bone marrow transplants illustrate this. [\*707] Torture for compassionate reasons is no more an act of brutality than surgery to transplant a kidney from one person to save another person. That is the path we are going down, not brutalizing people out of hatred. We condone torture in only one circumstance: as a means to save innocent lives. We condone it only for one reason: compassion. This is central to human flourishing and, as we shall see below in the context of the analogy with live organ transplants, is at the core of practices where the interests of one agent are sacrificed for those of another. A framework based on these criteria has little prospect of being extended to encompass malevolent practices. The slippery slope argument is a distraction in the context of our proposal. Slippery slopes, thin-ended wedges, and icebergs with small tips cannot be plucked out of thin air to fill logical deficiencies in one's argument. They have to be verified and proven.

### **THE LACK OF CAPITAL PUNISHMENT ABUSE PROVES THAT THERE WILL BE NO SLIPPERY SLOPE WITH TORTURE**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

[\*711] Second, we elaborate on the point in our first article that there is no evidence that lifesaving torture will lead to the violation of other rights where the pre-conditions for the practice are clearly delineated. n23

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Empirically based slippery slope arguments only obtain some traction where there is evidence that a practice similar to that being proposed has expanded beyond its intended scope of application after the practice was sanctioned. In order for the empirical version of the slippery argument to be plausible, it is necessary to point to a situation where condoning the lifesaving torture has yielded widespread abuses. We accept that this is obviously too high a standard in the case at hand, given that torture has never been legalized in the circumstances that we propose. The very least that can be expected in such cases is a close analogy, whereby a state sanctioned practice that was founded on a desire to save innocent lives has resulted in large scale abuses. There are no such analogies. In fact the closest analogies to our proposal lead to the opposite conclusion.

The salient features of our proposal are (1) the motivation for the practice is compassion; (2) it involves sacrificing a lower interest of one person to confer a greater benefit on another; (3) it is almost certain that the suspect has the relevant information; and (4) consent must be obtained by a state official (preferably a judge) before the activity can proceed.

While there are no institutionalized practices that have these precise four elements, there are some practices that come very close, and none of them have resulted in widespread abuses. The closest parallel is live donor organ transplants. Elements (1) and (2) are identical; the analogy with element (3) is obvious given that in most cases we are almost certain that the organ will be a match, and in relation to (4), in the place of a judge is a doctor.

Advances in medicine now make it possible to successfully perform procedures such as kidney and bone marrow transplants. These cause considerable pain to the donors, but confer a great benefit to the recipients. Less pain is caused by donating blood, but the underlying rationale is the same - hurting one person to benefit another. The practice of live donor transplants has not resulted in large scale abuse. In countries where there is a relatively high level of law and order, people are not plucked from the streets to have their organs plundered. Of course, the difference between this and our torture proposal is that the organ transfer process is consensual. This is not a [\*712] relevant difference because non-consensual practices based on the same rationales have not led to abuses.

To this end, a clear example is the process of criminal punishment. All nations imprison people that are regarded as being a risk to other members of the community. n24 Some nations even kill their worst offenders. This institutionalized system of harm infliction has not resulted in widespread abuses regarding the use of detention or state sanctioned execution.

## **AT: “Torture Undermines Democracy”**

**TORTURE CANNOT BE CONSIDERED ANTI-DEMOCRATIC – EMPIRICS AND PROTECTS THE RIGHT TO LIFE**  
**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

Some critics have sought to bolster the notion of democracy slightly by arguing that it is built on the foundation of respect for individuals and human rights, and that torture runs counter to this.<sup>n72</sup> This, in essence, is the dehumanizing point repeated under a different banner. If democracy does entail respect for individuals and human rights, then surely each individual counts equally in this process, including potential victims.

Even if we move from strictly majoritarianism accounts of democracy to more expansive and sophisticated accounts of the nature of democracy, which contend that democracy is a substantive rather than procedural concept, there seems no scope for labeling the institutionalization of lifesaving torture as a threat to democracy. For example, the democratic ideal adopted by Samuel Freeman provides that the only political and social institutions that are justifiable by democratic sovereignty are those that reflect the interests common to all people.<sup>n73</sup> It can hardly be doubted that the highest order interest shared by most people is the right to life. Moreover, as noted by Palmer, countries such as France, Britain, and Israel have all used torture widely over the past fifty years and "none have sunk into barbarism, or ceased to be a law-governed democracy."<sup>n74</sup>

## **AT: “Torture Violates International Law”**

### **TORTURE DOESN'T VIOLATE INTERNATIONAL LAW**

**TAYLOR AND WITTES, 2009**, SENIOR FELLOW AT THE BROOKINGS INSTITUTION AND CONTRIBUTING EDITOR FOR NEWSWEEK, AND SENIOR FELLOW AND RESEARCH DIRECTOR IN PUBLIC LAW AT THE BROOKINGS INSTITUTION [STUART AND BENJAMIN, “LOOKING FORWARD, NOT BACKWARD: REFINING AMERICAN INTERROGATION LAW”],

[HTTP://WWW.BROOKINGS.EDU/~MEDIA/FILES/RC/PAPERS/2009/0510\\_INTERROGATION\\_LAW\\_WITTES/0510\\_INTERROGATION\\_LAW\\_WITTES.PDF](http://www.brookings.edu/~media/files/rc/papers/2009/0510_interrogation_law_wittes/0510_interrogation_law_wittes.pdf)

Fourth, opponents of any coercion argue that any use of interrogation methods that can reasonably be called “torture” either violates the 1994 law making torture a crime or invites disrespect for that law. Moreover, they argue that any use of near-torture, or even mildly coercive interrogation, violates international law, including the Geneva Conventions and the U.N. Convention Against Torture and Other Cruel, Humiliating, or Degrading Treatment or Punishment. It follows that even far more judicious use of coercive interrogation than that practiced by the Bush Administration opens the United States to charges of violating international law, including its treaty obligations. The trouble with this argument is that while the use of torture and near-torture surely violates international law, the use of mildly coercive interrogation on stateless terrorists does not clearly violate Geneva or any other international agreement, at least not as ratified by the United States. In addition, not all use of near-torture violates U.S. law. Finally, while the U.S. should strive to comply with international law when possible, neither it nor any other nation has shrunk from violating international law when necessary to protect its vital interests.



## **AT: “Torture Yields Bad Information”**

**TORTURE DOES NOT PRODUCE FALSE INFORMATION – EVEN SENIOR AL-QAEDA MEMBERS INDICATE THIS THIESSEN, 2009**, VISITING FELLOW AT THE HOOVER INSTITUTION AND SERVED IN SENIOR POSITIONS IN THE PENTAGON AND THE WHITE HOUSE FROM 2001 TO 2009 (MARC, “THE CIA’S QUESTIONING WORKED”, APRIL 21, [HTTP://WWW.WASHINGTONPOST.COM/WP-DYN/CONTENT/ARTICLE/2009/04/20/AR2009042002818\\_PF.HTML](http://www.washingtonpost.com/wp-dyn/content/article/2009/04/20/AR2009042002818_pf.html))

Critics claim that enhanced techniques do not produce good intelligence because people will say anything to get the techniques to stop. But the memos note that, "as Abu Zubaydah himself explained with respect to enhanced techniques, 'brothers who are captured and interrogated are permitted by Allah to provide information when they believe they have reached the limit of their ability to withhold it in the face of psychological and physical hardship.'" In other words, the terrorists are called by their faith to resist as far as they can -- and once they have done so, they are free to tell everything they know. This is because of their belief that "Islam will ultimately dominate the world and that this victory is inevitable." The job of the interrogator is to safely help the terrorist do his duty to Allah, so he then feels liberated to speak freely.

## **AT: “Torture Has Low Success Rate”**

**TORTURE IS SUCCESSFUL, AND IT WOULD STILL BE JUSTIFIED EVEN IF IT HAD A LOW SUCCESS RATE DUE TO THE MAGNITUDE OF THE CATASTROPHES IT PREVENTS**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**

[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

Given the clandestine nature of torture and the almost total dearth of reliable data kept on such events, it is verging on intellectual dishonesty to purport to provide an overarching account or precise summary of the extent to which torture victims fess up. n55 The only salient points to be drawn about the effectiveness of torture are (1) that we know as a fact that humans dislike pain and will try to avoid it, and (2) all the information from past instances of torture reveals only the following: sometimes it has resulted in suspects divulging information to security officials who have used the information to save other people; sometimes it has not been effective. It is not easy to find situations where torturers take at least some steps to ensure that the suspect has the relevant knowledge and torture is not at least partially motivated by an institutionalized dislike of [\*721] the victim, as is normally the case in wartime situations. Yet, it is possible to obtain some useful data regarding the effectiveness of torture. In this regard we need to look to more mundane incidents of torture, as opposed to torture in war-like settings, which is often motivated by intense hatred towards the victim (as opposed to a genuine desire to obtain information - especially information that is known to be in the possession of the victim) and in circumstances where the rule of law is often suspended. The closest analogy that can be made to our proposal relates to garden variety police investigations. Police normally do not have a strong desire to punish any particular sections of the community and take some steps to ensure that they only arrest people where there is evidence of involvement in the crime in question. Sometimes police break the law and assault suspects in a bid to ascertain the truth. Given that they do not normally have a preexisting dislike of the suspect, their techniques are presumably motivated at least largely by reasons of information gathering so that the crime can be solved. The ultimate motivation, one assumes, is to enhance community safety, as opposed to a desire to humiliate or punish the suspect. Courts have highlighted a number of instances where the will of suspects has been overborne as a result of police beatings, threats, and other acts of thuggery. We are not talking about contrived confessions to stop the beatings and the like, but reliable confessions made to stop the pain. n56 And if suspects are willing to betray themselves by confessing to crimes that will result in their long term incarceration, it follows that they will betray their cause and provide information that will save innocent lives. Thus, the argument that torture never works is unsupportable. Rather, the most accurate assessment of the efficacy of torture as an information gathering device is that it will sometimes fail, while on other occasions it will succeed. We agree with Rumney that the issue of effectiveness is central in this debate. n57 The way forward here is to obtain more pointed data regarding the circumstances in which torture [\*722] has been effective and when it has failed. The study could only be retrospective - no one would seriously contemplate actually torturing people for experimental purposes. The surveyed cases should be confined to instances of torture that as closely as possible resemble the torture framework we suggest, i.e. where the mistreatment is not for punitive reasons, and the suspect is known to have the relevant information. To this end, the only viable respondents would consist of former and current police officers, who would need to be given absolute immunity from prosecution for the information that they disclosed. It is important to note that the results of such a study cannot lead to the conclusion that torture is never justifiable. If it transpires that even the most effective torture techniques only elicit the relevant information in a small number of cases, this would mean that the plus side of the scales would need to be heavier than first proposed for torture to be justified. If thousands of lives were at stake, even a twenty percent likelihood that torture would be effective would justify the use of torture. Ultimately, we cannot guarantee that torture will work in any given instance, but we can be virtually certain that doing nothing will fail when we are faced with an imminent catastrophe.

## **AT: “Wrong People Get Tortured”**

**TORTURING THE WRONG PEOPLE IS THE EXCEPTION NOT THE RULE AND SHOULDN'T BE INCLUDED IN THE CALCULUS OF TORTURE'S EFFECTIVENESS**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

Some critics have argued that our proposal is unsound because of the difficulties involved in identifying persons who have the relevant knowledge. n53 To buttress their argument they give examples of errors made by police and security officials in making false arrests. n54 The fallacy in this argument is that it attempts to extrapolate the exception into the rule. For every false arrest it would be possible, literally, to give hundreds and perhaps thousands of examples of the right person being detained or questioned. Often there is little doubt that a person is involved in a criminal activity. Sometimes they make admissions; other times they are caught from surveillance cameras before the attack (as were the London bombers on July 7, 2005 - although the tape was not noticed until after the bombs went off). The fact that mistakes regarding identity are sometimes made is no more of an argument against our proposal than it is for closing the entire criminal justice system given the number of innocent people that are falsely imprisoned.

## AT: “Biopolitics Good”

### **BIOPOLITICS GOOD—IT LEADS TO FREEDOM AND RESISTANCE TO THE MOST OPPRESSIVE PARTS OF THE SYSTEM THROUGH RESISTANCE FROM BELOW**

**DICKINSON**, UNIVERSITY OF CINCINNATI, MARCH 2004 [EDWARD ROSS, “BIOPOLITICS, FASCISM, DEMOCRACY: SOME REFLECTIONS ON OUR DISCOURSE ABOUT “MODERNITY,” *CENTRAL EUROPEAN HISTORY*, VOL. 37, NO. 1, P.41-44]

In any case, the focus on the activities and ambitions of the social engineers in the literature on biopolitical modernity has begun to reach the point of diminishing returns. In the current literature, it seems that biopolitics is almost always acting on (or attempting to act on) people; it is almost never something they do. This kind of model is not very realistic. This is not how societies work. The example of the attempt to create a eugenic counseling system in Prussia should be instructive in this respect. Here public health and eugenics experts—technocrats—tried to impart their sense of eugenic crisis and their optimism about the possibility of creating a better “race” to the public; and they successfully mobilized the resources of the state in support of their vision. And yet, what emerged quite quickly from this effort was in fact a system of public contraceptive advice — or family planning. It is not so easy to impose technocratic ambitions on the public, particularly in a democratic state; and “on the ground,” at the level of interactions with actual persons and social groups, public policy often takes on a life of its own, at least partially independent of the fantasies of technocrats.

This is of course a point that Foucault makes with particular clarity. The power of discourse is not the power of manipulative elites, which control it and impose it from above. Manipulative elites always face resistance, often effective, resistance. More important, the power of discourse lies precisely in its ability to set the terms for such struggles, to define what they are about, as much as what their outcomes are. As Foucault put it, power—including the power to manage life — “comes from everywhere.”<sup>105</sup> Biomedical knowledge was not the property only of technocrats, and it could be used to achieve ends that had little to do with their social-engineering schemes.<sup>106</sup>

Modern biopolitics is a multifaceted world of discourse and practice elaborated and put into practice at multiple levels throughout modern societies. And of course it is often no less economic—no less based on calculations of cost and benefit—at the level of the individual or family than it is in the technocrats’ visions of national efficiency.

In fact, the literature of the past twenty years has made it abundantly clear that a great deal of “official” biopolitical discourse generated by academics and civil servants was essentially

reactive. A vast amount of discussion among eugenics, population policy, and welfare experts focused on the concrete “problem” of the demographic transition of the early twentieth century. It was the use of reproductive knowledge and reproductive technology by millions of Europeans to limit their fertility — the Geburtenrückgang or decline of births, in German parlance — that was the center of concern. While much of the historical literature stresses the role of science in shaping technocratic ambition, of course actually a large proportion of the technocrats’ discourse was concerned with orchestrating a return to more “natural” and less technologically-enabled reproductive patterns. The problem, particularly for the more influential moderate and pronatalist branch of eugenics, was not only how to apply modern science to humanity, but more importantly how to get humanity to stop applying modern science to itself.

Atina Grossmann, in her history of the organized mass popular movement for fertility control in Germany in the 1920s, has given us a good example of what this shift in perspective can reveal. Grossmann stresses the technocratic ambition and relatively conservative intent of many medical sex reformers, the power of the “motherhood-eugenics consensus” to shape and limit acceptable definitions of women’s social and sexual roles and aspirations in this period, and the prevalence of the rhetoric of “social health, medicalization, cost

effectiveness, and national welfare.” And yet, in the final analysis she describes a powerful reform movement that helped to spread contraceptives and contraceptive knowledge widely among the German population. Popular groups were “increasingly insistent that the working class also had a right to the benefits of scientific progress” (in the form of contraceptive technologies); and while most of the medical establishment opposed the widespread use of contraceptives, the popular movement garnered critical support from radical socialists within the medical profession. As Grossmann remarks, “the German case is instructive precisely because it illustrates the fallacies of setting up rigid categories of ‘popular’ and ‘professional.’”<sup>107</sup>

In short: is the microphysics of modern power/knowledge always the microphysics of oppression, exploitation, and manipulation? Are technocratic elites always in charge of the imperatives of discourse — or do discourses have their own logic, which technocrats can define, escape or direct no more (or less) than can anyone else? Discourse may or may not be a locomotive, driving down a pre-determined track and dictating individual decisions and fates by its own internal logic; but even if it is, the technocrats aren’t driving it, and in fact their schemes may get field of state activity was often the product of technocratic “readings” of biopolitical discourse. But it was only one small part of a much broader process by which a large proportion of the German population came to define their needs and aspirations in new ways. We need not exaggerate the degrees of freedom that process generated to be able to appreciate that in some cases, to some extent, and sometimes willy-nilly, discourse and policy were actually a response to that broader process of redefinition — in short, to “demand-side” pressures.

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Uncoupling “technocracy” from “discourse” is not yet enough, however. We should also be alive to the ways in which new social practices, institutions, and knowledge generated new choices — a limited range of them, constrained by all kinds of discursive and social frameworks, but nonetheless historically new and significant. Modern biopolitics did create, in a real sense, not only new constraints but also new degrees of freedom— new levers that increased people’s power to move their own worlds, to shape their own lives. Our understanding of modern biopolitics will be more realistic and more fruitful if we reconceptualize its development as a complex process in which the implications of those new choices were negotiated out in the social and discursive context. Again, in the early twentieth century many more conservative biopolitical “experts” devoted much of their energy precisely to trying— without any discernable success— to control those new degrees of freedom. For most social liberals and Social Democrats, however, those new choices were a potential source of greater social efficiency and social dynamism. State policy reflected the constant negotiation and tension between these perspectives.

Nor should we stop at a reexamination of knowledge and technology. It might make sense, too, to reexamine the process of institution-building, the elaboration of the practices and institutions of biopolitics. No doubt the creation of public and private social welfare institutions created instruments for the study, manipulation, or control of individuals and groups. But it also generated opportunities for self-organization and participation by social groups of all kinds. Grossmann’s birth control movement was but one instance of the explosive growth of the universe of associational life in the field of biopolitics, which itself was only one small part of a much broader development: the self-creation of a new, urban industrial social order, the creation of a self-government of society through myriad nongovernmental organizations. In these organizations, citizens were acting to shape their own lives in ways that were often fundamentally important as part of lived experience — of the “life world.” Of course there was nothing inherently democratic about these organizations or their social functions — many were authoritarian in structure, many cultivated a tendentially elitist culture of expertise, and some pursued exclusionary and discriminatory agendas. Nevertheless, they institutionalized pluralism, solicited participation, enforced public debate, and effectively sabotaged simple authoritarian government. Again, National Socialist totalitarianism was in part a response precisely to the failure of political, social, and cultural elites to contain and control this proliferation of voices, interests, and influence groups.<sup>108</sup>

**BIOPOLITICS IS GOOD—ONLY SEEING IT AS BAD A) IGNORES THE MASSIVE DECREASE IN STRUCTURAL VIOLENCE IT HAS CAUSED AND B) VIEWS POWER UNIDIRECTIONALLY IN CONTRADICTION WITH THEIR OWN CRITIQUE**

**DICKINSON**, UNIVERSITY OF CINCINNATI, MARCH 2004 [EDWARD ROSS, “BIOPOLITICS, FASCISM, DEMOCRACY: SOME REFLECTIONS ON OUR DISCOURSE ABOUT “MODERNITY,” *CENTRAL EUROPEAN HISTORY*, VOL. 37, NO. 1, P. 36-39

This understanding of the democratic and totalitarian potentials of biopolitics at the level of the state needs to be underpinned by a reassessment of how biopolitical discourse operates in society at large, at the “prepolitical” level. I would like to try to offer here the beginnings of a reconceptualization of biopolitical modernity, one that focuses less on the machinations of technocrats and experts, and more on the different ways that biopolitical thinking circulated within German society more broadly.

It is striking, then, that the new model of German modernity is even more relentlessly negative than the old Sonderweg model. In that older model, premodern elites were constantly triumphing over the democratic opposition. But at least there was an opposition; and in the long run, time was on the side of that opposition, which in fact embodied the historical movement of modernization. In the new model, there is virtually a biopolitical consensus.<sup>92</sup> And that consensus is almost always fundamentally a nasty, oppressive thing, one that partakes in crucial ways of the essential quality of National Socialism. Everywhere biopolitics is intrusive, technocratic, top-down, constraining, limiting. Biopolitics is almost never conceived of— or at least discussed in any detail— as creating possibilities for people, as expanding the range of their choices, as empowering them, or indeed as doing anything positive for them at all.

Of course, at the most simple-minded level, it seems to me that an assessment of the potentials of modernity that ignores the ways in which biopolitics has made life tangibly better is somehow deeply flawed. To give just one example, infant mortality in Germany in 1900 was just over 20 percent; or, in other words, one in five children died before reaching the age of one year. By 1913, it was 15 percent; and by 1929 (when average real purchasing power was not significantly higher than in 1913) it was only 9.7 percent.<sup>93</sup> The expansion of infant health programs— an enormously ambitious, bureaucratic, medicalizing, and sometimes intrusive, social engineering project— had a great deal to do with that change. It would be bizarre to write a history of biopolitical modernity that ruled out an appreciation for how absolutely wonderful and

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astonishing this achievement— and any number of others like it — really was. There was a reason for the “Machbarkeitswahn” of the early twentieth century: many marvelous things were in fact becoming machbar. In that sense, it is not really accurate to call it a “Wahn” (delusion, craziness) at all; nor is it accurate to focus only on the “inevitable” frustration of “delusions” of power. Even in the late 1920s, many social engineers could and did look with great satisfaction on the changes they genuinely had the power to accomplish. Concretely, moreover, I am not convinced that power operated in only one direction — from the top down— in social work. Might we not ask whether people actually demanded welfare services, and whether and how social workers and the state struggled to respond to those demands? David Crew and Greg Eghigian, for example, have given us detailed studies of the micropolitics of welfare in the Weimar period in which it becomes clear that conflicts between welfare administrators and their “clients” were sparked not only by heavyhanded intervention, but also by refusal to help.<sup>94</sup> What is more, the specific nature of social programs matters a great deal, and we must distinguish between the different dynamics (and histories) of different programs. The removal of children from their families for placement in foster families or reformatories was bitterly hated and stubbornly resisted by working-class families; but mothers brought their children to infant health clinics voluntarily and in numbers, and after 1945 they brought their older children to counseling clinics, as well. In this instance, historians of the German welfare state might profit from the “demand side” models of welfare development that are sometimes more explicitly explored in some of the international literature.<sup>95</sup> In fact, even where social workers really were attempting to limit or subvert the autonomy and power of parents, I am not sure that their actions can be characterized only and exclusively as part of a microphysics of oppression. Progressive child welfare advocates in Germany, particularly in the National Center for Child Welfare, waged a campaign in the 1920s to persuade German parents and educators to stop beating children with such ferocity, regularity, and nonchalance. They did so because they feared the unintended physical and psychological effects of beatings, and implicitly because they believed physical violence could compromise the development of the kind of autonomous, self-reliant subjectivity on which a modern state had to rely in its citizenry.<sup>96</sup> Or, to give another common example from the period, children removed from their families after being subjected by parents or other relatives to repeated episodes of violence or rape were being manipulated by biopolitical technocrats, and were often abused in new ways in institutions or foster families; but they were also being liberated. Sometimes some forms of the exercise of power in society are in some ways emancipatory; and that is historically significant.

Further, of course we must ask whether it is really true that social workers’ and social agencies’ attempts to manipulate people worked. My own impression is that social policy makers grew increasingly aware, between the 1870s and the 1960s, that their own ends could not be achieved unless they won the cooperation of the targets of policy. And to do that, they had to offer people things that they wanted and needed. Policies that incited resistance were — sometimes with glacial slowness, after stubborn and embittered struggles—de-emphasized or even abandoned. Should we really see the history of social welfare policy as a more or less static (because the same thing is always happening) history of the imposition of manipulative policies on populations? I believe a more complex model of the evolution of social policy as a system of social interaction, involving conflicting and converging demands, constant negotiation, struggle, and— above all— mutual learning would be more appropriate. This is a point Abram de Swaan and others have made at some length; but it does not appear to have been built into our theory of modernity very systematically, least of all in German history.<sup>97</sup>

**BIOPOLITICS IS NOT THE PROBLEM IN AND OF ITSELF, IT’S BIOPOLITICS DEPLOYED IN TOTALITARIAN SOCIETIES WHICH IS BAD—OUR STRENGTHENING OF DEMOCRATIC STRUCTURES PREVENTS, NOT CAUSES, THEIR IMPACT**

DICKINSON, UNIVERSITY OF CINCINNATI, MARCH 2004 [EDWARD ROSS, “BIOPOLITICS, FASCISM, DEMOCRACY: SOME REFLECTIONS ON OUR DISCOURSE ABOUT “MODERNITY,” *CENTRAL EUROPEAN HISTORY*, VOL. 37, NO. 1, P. 18-19]

In an important programmatic statement of 1996 Geoff Eley celebrated the fact that Foucault’s ideas have “fundamentally directed attention away from institutionally centered conceptions of government and the state . . . and toward a dispersed and decentered notion of power and its ‘microphysics.’”<sup>48</sup> The “broader, deeper, and less visible ideological consensus” on “technocratic reason and the ethical unboundedness of science” was the focus of his interest.<sup>49</sup> But the “power-producing effects in Foucault’s ‘microphysical’ sense” (Eley) of the construction of social bureaucracies and social knowledge, of “an entire institutional apparatus and system of practice” ( Jean Quataert), simply do not explain Nazi policy.<sup>50</sup> The destructive dynamic of Nazism was a product not so much of a particular modern set of ideas as of a particular modern political structure, one that could realize the disastrous potential of those ideas. What was critical was not the expansion of the instruments and disciplines of biopolitics, which occurred everywhere in Europe. Instead, it was the principles that guided how those instruments and disciplines were organized and used, and the external constraints on them. In National Socialism, biopolitics was shaped by a totalitarian conception of social management focused on the power and ubiquity of the völkisch state. In democratic societies, biopolitics has historically been constrained by a rights-based strategy of social management. This is a point to which I will return shortly. For now, the point is that what was decisive was actually politics at the level of the state.

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A comparative framework can help us to clarify this point. Other states passed compulsory sterilization laws in the 1930s — indeed, individual states in the United States had already begun doing so in 1907. Yet they did not proceed to the next steps adopted by National Socialism — mass sterilization, mass “eugenic” abortion and murder of the “defective.” Individual figures in, for example, the U.S. did make such suggestions. But neither the political structures of democratic states nor their legal and political principles permitted such policies actually being enacted. Nor did the scale of forcible sterilization in other countries match that of the Nazi program. I do not mean to suggest that such programs were not horrible; but in a democratic political context they did not develop the dynamic of constant radicalization and escalation that characterized Nazi policies.

**THEIR CRITIQUE OF BIOPOLITICS HAS A PESSIMISTIC VIEW OF MODERNITY, TOTALIZING A DIVERSE HISTORICAL EPOCH AND IGNORING THE GOOD MANIFESTATIONS OF BIOPOLITICAL GOVERNANCE— NAZISM IS THE EXCEPTION, NOT THE RULE**

DICKINSON, UNIVERSITY OF CINCINNATI, MARCH **2004** [EDWARD ROSS, “BIOPOLITICS, FASCISM, DEMOCRACY: SOME REFLECTIONS ON OUR DISCOURSE ABOUT “MODERNITY,” *CENTRAL EUROPEAN HISTORY*, VOL. 37, NO. 1, P.21-23]

This issue is important, I believe, in part because the project of ferreting out the contribution of biopolitical discourses to the construction of National Socialism so dominates the literature, creating a sense of impending disaster that I believe has all too strongly shaped the questions we, as historians, are asking about the history of modern biopolitics. I want to give two

examples that I believe reveal the way this focus constrains our collective historical imagination. I do so not in order to point out that my colleagues are “wrong,” but to suggest how powerfully our imaginations and our questions are shaped by the specter and spectacle of National Socialism. In a brilliant review article published in 1996, Peter Fritzsche posed the question “Did Weimar Fail?” Fritzsche gave voice to a healthy skepticism regarding the tendency in the literature to imply that the history of social welfare programs

is only part of the prehistory of National Socialism. The “darker vision of modernism” presented by Detlev Peukert, he suggested, “is compelling but not wholly persuasive.” The “spirit of science” itself, he argued, does not introduce “quite so

automatically a ‘discourse of segregation’ without the application of racist politics”; and he asked “to what extent are reformist practices invariably collusions in disciplinary regimes?” And yet, Fritzsche’s reflections are haunted by almost unrelieved foreboding, which merely accurately reflects the tone of the literature he was reviewing. He suggested that “the central theme of this scholarship . . . is the regimentation and discipline of citizens in often dangerously imaginative ways”; it “establishes

significant continuities between the Weimar era and the Third Reich”; the history of the republic reveals the “dark shadows of modernity.”<sup>58</sup> Indeed, the conceptual framework Fritzsche set up seems to take totalitarianism, war, and mass murder as the end-point of “continuity.” Taking up a question asked by Gerald Feldman, Fritzsche suggested that the Weimar Republic was neither a gamble nor an experiment, but rather a laboratory of

modernity. From this perspective, Fritzsche asserts, perhaps Weimar should be regarded as “less a failure than a series of bold experiments that do not come to an end with the year 1933.” The failure of political democracy “is not the same as the destruction of the laboratory.” Thus, the “coming of the Third Reich was not so much a verification of Weimar’s singular failure as the validation of its dangerous potential.”<sup>59</sup>

Fritzsche’s was a wonderful metaphor for Weimar Germany, a period of enormous creativity and experimentation in any number of fields; and it is surely also a fruitful way to conceive of the relationship between Weimar and Nazi Germany. And yet—again, as Fritzsche’s more skeptical comments pointed out—the laboratory didn’t simply stay open; the experimenters didn’t simply keep experimenting; not all the experiments simply kept running under new management.<sup>60</sup> Particular kinds

of experiments were not permitted in the Third Reich: those founded on the idea of the toleration of difference; those that defined difference as a psychological, political, or cultural fact to be understood and managed, rather than as a form of deviance or subversion to be repressed or eliminated; those founded on the idea of integration through self-directed participation (as opposed to integration through orchestrated and obedient participation); and those that aimed at achieving a stable pluralism. There were many such experiments under way in the Weimar period; given the extent to which the political fabric of the Weimar Republic was rent by ideological differences, they were often of particular importance and urgency. Many of those experiments appeared to be failing by the end of the 1920s; and that in itself was a critically important reason for the appeal of the ideas championed by the Nazis. The totalitarian and biological conception of national unity was in part a response to the apparent failure of a democratic and pluralist model of

social and political integration. And yet, many of those very same experiments were revived, with enormous success, after 1949. Examples from my own field of research might include the development of a

profession of social work that claimed to be a value-neutral foundation for cooperation between social workers of radically differing ideological orientation; the development of a psychoanalytic, rather than psychiatric, interpretation of “deviance” (neurosis replaces inherited brain defects); and the use of corporatist structures of governance within the welfare bureaucracy. These mechanisms did not work perfectly. But they were a continuation of “experiments” undertaken in the Weimar period and shut down in 1933; and they did contribute to the stabilization of a pluralist democracy. That was not a historically trivial or self-evident achievement, either in Germany or elsewhere. It required time, ingenuity, and a large-scale convergence of

long-term historical forces. We should be alive to its importance as a feature of modernity. As Fritzsche’s review makes clear, then,

much of the recent literature seems to imply that National Socialism was a product of the “success” of a modernity that ends in 1945; but it could just as easily be seen as a temporary “failure” of modernity, the “success” of which would only come in the 1950s and 1960s. As Paul Betts recently remarked, We should not present the postwar period as a “redemptive tale of modernism triumphant” and cast Nazism as merely a “regressive interlude.” But neither should we dismiss the fact that such a

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narrative would be, so to speak, half true— that the democratic welfare state is no less a product of modernity than is totalitarianism.



## **AT: “Utilitarian Justifications Bad”**

**UTIL IS THE ONLY CALCULUS REGARDING TORTURE THAT CAN COHERENTLY INCLUDE GOVERNMENT’S OBLIGATION TO BALANCE THE INTERESTS OF ALL ITS CITIZENRY**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

Williams argues that if Jim were a utilitarian he would kill the Indian. n81 Williams himself has trouble accepting this outcome. Williams's quarrel is not necessarily with the result that utilitarianism commits one to (in fact he has subsequently stated that he too would shoot the Indian), but with the reasoning process employed by the utilitarian to resolve the dilemma. Williams contends that utilitarianism cuts out considerations that most would think integral to such cases, such as the idea that each of us is specially responsible for what he or she does, rather than what others do. n82 This, therefore, makes utilitarianism unintelligible because it fails to appreciate the relationship between a man and his projects.

At least implicitly, anti-torture proponents seem to be endorsing this account of personal responsibility by failing to expressly consider the interests of the innocent people at risk. There is some merit in this view. As individuals we cannot be expected to take responsibility and attempt to correct all the potential injustices that we can potentially correct. This would make life intolerable and cut us off from many of the activities that give life meaning and purpose. People achieve happiness [\*728] not only by making other people happy but through a vast range of projects such as being committed to persons, causes, institutions, or any other of a multitude of activities. n83

The notion of personal responsibility, however, is ultimately not so narrow to enable societies to avoid responsibility for preventable deaths. At the personal level, one of us (Bagaric) has argued that our obligations are circumscribed by the maxim of positive duty. This is the view that we must assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to ourselves. n84

There are occasions when acting morally requires us to do more than merely refrain from certain behavior - where we must actually do something. Morality defined exhaustively as a set of negative proscriptions fails to explain why it is morally repugnant for Bill Gates to refuse to give his loose change to the starving peasant whose path he crosses, or why it is wrong to decline to save the child drowning in a puddle in order to avoid getting our shoes wet, or to refuse to throw a life rope to the person drowning beside the pier. Torturing a suspect to save other people from being killed arguably does not come within this principle - inflicting pain on another person is no minor inconvenience.

However, different considerations apply regarding governmental obligations and the institutionalization of practices. Governments have a duty to implement practices and processes that balance the countervailing interests of all the citizenry regarding actual and foreseeable practices and events. Thus, governments are required to form defense forces, police forces, courts, and hospitals. In the operation of such institutions, each individual's interests must count equally.

Given that it is foreseeable that people will continue to engage in activities that threaten the lives of others, it would be remiss for the government not to develop a framework for dealing with such scenarios. The number of situations where such a framework may be utilized will be rare, but given the enormity of issues that are relevant, the matter cannot be ignored.

Thus, the critics have no basis for considering only one aspect of the torture equation when they are developing their responses. If torture is never permissible, they are required to explain which account [\*729] of responsibility shields them from being responsible for the deaths of innocent people whom they refused to assist.

**THERE IS NO ALTERNATIVE TO UTILITARIANISM – IGNORING CONSEQUENCES ONLY REINFORCES DOMINATION**

**BAGARIC**, HEAD OF DEAKIN LAW SCHOOL **AND CLARKE**, LECTURER AT DEAKIN LAW SCHOOL, **2005**  
[MIRKO AND JULIE, ARTICLE: NOT ENOUGH OFFICIAL TORTURE IN THE WORLD? THE CIRCUMSTANCES IN WHICH TORTURE IS MORALLY JUSTIFIABLE, UNIVERSITY OF SAN FRANCISCO OF LAW REVIEW, 39 U.S.F. L. REV. 581, LEXIS]

Certainly, it is appropriate to criticize utilitarianism, but to do so requires reasons in support of such a contention. The remark that it must be wrong because it leads to bad outcomes was dealt with in the previous article n102 - as a society when we find ourselves in a jam we do (and should) follow the path of harm minimization - this is the ultimate "tie breaker." To persuasively criticize our account requires the advancement of an alternative moral theory that can provide coherent answers across the whole spectrum of moral issues that we as individuals, and together as a society, face from time to time. Absent such a

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theory we get randomness or, worse still, the domination of those prone to high emotion with loud voices - the antithesis of a moral code.

[\*733] To illustrate this point, we provide two examples of the problems that beset theorists who do not endorse a utilitarian approach. They come from rebuttals to our paper published in the Deakin Law Review. The first is an article by John Kleinig who elegantly advances many of the criticisms that we rebut in this Article. n103 Ostensibly, many readers will be attracted to some of his arguments, but his approach collapses when he finally addresses the proposal at hand. At a lecture on the subject of torture, delivered several days after our opinion piece was published in The Age, he said that our proposal was illogical. n104 "The Deakin lecturers' argument - that torture in extreme situations may be justified because the interests of many can outweigh the suffering of a few - was inhumane and illogical." n105 "However, he then conceded that if Melbourne were under threat of a nuclear attack, which was then averted by torturing a confession from a suspect, he would be relieved." n106 His resolution of this apparent contradiction: "That may be the one situation where we as a society might say, 'You went out on a limb and did something we're totally opposed to, but it had a good result, so we forgive you.'" n107

This is the sort of confusion that occurs if moral dilemmas are approached on the basis of piecemeal solutions without the support of underlying theories. When non-consequentialist theories are applied to hard cases they become unstable - often leading to unprincipled compromises. This is because they are lacking in substance, meaning that their proponents are reduced to relying on "fine phrases [that] are the last resource of those who have run out of arguments." n108

This is highlighted by Desmond Manderson's contribution to the debate. He offers an impassioned argument against torture. In the end, his reasons for dismissing lifesaving torture are:

Torture is wrong under all circumstances, not because it leads to certain bad outcomes, but for no reason: simply and inherently. This is not a perverse argument. Love, for example, is good not because it might lead us to wealth or happiness, but for no reason. It just is. In fact, to look for reasons, to ask "what is love good for" or "how does loving someone benefit me?" is a sign of psychopathy. If [\*734] Bagaric and Clarke and Faris cannot see the inherent wrong of torture, it is hard to see how to communicate with them. n109

In fact, moral discourse does require reasons - otherwise, as noted above, yelling wins the day. The emptiness of Manderson's "reasoning" is highlighted by substituting "women's rights" for "torture" in the above quote and studying the evolution of the women's movement in the United States as recently as 150 years ago or in contemporary Iran or Saudi Arabia. Moreover, love is not self-evidently good - hence the reason for so many domestic killings in the name of love. In the end, only consequences matter.

**\*Detention Without Charge/Habeas Corpus Answers\***

## **Habeas Protections Exist for Non-Citizens Now**

### **BOUMEDIENE EXTENDED HABEAS PROTECTION TO NON-CITIZENS**

Marjorie Cohn, Law Professor-Thomas Jefferson School of Law, 2011, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 360

In 2008, the Supreme Court decided *Boumediene v. Bush*, upholding habeas corpus rights for the Guantanamo detainees. In a 5-4 ruling, the Court held that they have a constitutional right to habeas corpus, and that the scheme for reviewing “enemy combatant” designations under the Combatant Status Review Tribunals is an inadequate substitute for habeas corpus.

## **Guantanamo Bay Detainees Rights Protected**

### **US DOES APPLY GENEVA CONVENTION PROTECTIONS TO CAPTURED TALIBAN FIGHTERS**

Eric Muller, Professor, University of North Carolina School of Law, 2002, West Virginia Law Review, 104 W. Va L. Rev. 571, p. 590

We have seen the same pattern play out on the issue of the status of captured Taliban fighters. Initially the administration staked out the position that neither Taliban nor al Qaeda fighters captured in Afghanistan were formally entitled to the protections of the Geneva Conventions; it deemed them all "unlawful combatants." Protest from domestic and international human rights groups and some of our European allies followed. Eventually Secretary of State Colin Powell persuaded others in the administration that denying the protection of the Geneva Conventions to Taliban captives would compromise our claim for compliance with those conventions for captured American soldiers overseas. And the President announced a change in policy: while none of the captives was to be given formal prisoner-of-war status, Taliban captives would be entitled to the protections of the Geneva Conventions. n96

## **Detention of Resident Aliens Justified**

### **PATRIOT ACT DETENTION PROVISIONS INCLUDE SAFEGUARDS**

Jan C. Ting, Professor of Law, Temple University, 2002, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1150

The USA PATRIOT Act mandates the detention of aliens whom the Attorney General has certified as meeting the criteria for terrorism, until the aliens are removed from the United States or the Attorney General determines that the terrorism criteria no longer apply. n30 Safeguards built into this provision include a limitation on the Attorney General's authority to delegate his certification power to the Deputy Attorney General and no one else, n31 a requirement to begin removal proceedings or bring criminal charges within seven days of the commencement of detention, n32 a limitation on the detention of aliens who cannot be removed to those whose release would threaten national security or public safety, n33 mandatory review of certification by the Attorney General every six months, n34 and a provision for judicial review and appeals. n35

This power to certify aliens as meeting the criteria for terrorism has not yet been employed by the Attorney General. Instead, those aliens detained by the federal government and held in custody in the United States fall into three categories: (1) those charged with unrelated federal, state, and local criminal law violations; (2) those charged with immigration law violations; and (3) those held as material witnesses as authorized by a federal court. n36

The USA PATRIOT Act is a reasoned response by Congress to the events of September 11 and the continuing threat posed by terrorism because it is the product of a functioning system of democratic checks and balances.

### **DOJ DETENTIONS CONSISTENT WITH ESTABLISHED CONSTITUTIONAL LAW**

Viet D. Dinh, Assistant Attorney General, DOJ, 2002, Harvard Journal of Law & Public Policy, 25 Harv. J.L. & Pub. Pol'y 399, p. 402

With respect to detentions, the Department has taken several hundred persons into custody in connection with our investigation of the September 11 attacks. Every one of these detentions is consistent with established constitutional and statutory authority. Each of the detainees has been charged with a violation of either immigration law or criminal law, or is the subject of a material witness warrant issued by a court. The aim of the strategy is to reduce the risk of terrorist attacks on American soil, and the Department's detention policy already may have paid dividends. These detentions may have incapacitated an Al Qaeda sleeper cell that was planning to strike a target in Washington, DC--perhaps the Capitol building--soon after September 11. n5

The detainees enjoy a variety of rights, both procedural and substantive. Each of them has the right of access to counsel. In the criminal cases and in the case of material witnesses, the person has the right to a lawyer at government expense if he cannot afford one. Persons detained on immigration violations also have a right of access to counsel, and the Immigration and Naturalization Service provides each person with information about available pro bono representation. Every person detained has access to telephones, which they may use to contact their family members or attorneys, during normal waking hours.

Once taken into INS custody, aliens are given a copy of the "Detainee Handbook," which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials. In addition, every alien is given a comprehensive medical assessment, including dental and mental-health screenings. Aliens are informed of their right to communicate with their nation's consular or diplomatic officers, and, for some countries, the INS will notify those officials that one of their nationals has been arrested or detained. Finally, Immigration Judges preside over legal [\*403]proceedings involving aliens, and aliens have the right to appeal any adverse decision, first to the Board of Immigration Appeals, and then to the federal courts.

### **WAR ON TERRORISM'S DETENTION OF RESIDENT ALIENS NOT A VIOLATION OF CIVIL LIBERTIES**

Mark Tushnet, Professor of Constitutional Law, Georgetown University Law Center, 2003, Wisconsin Law Review, 2003 Wis. L. Rev. 273, p. 296-7

An examination of other actions that have been described as threats to civil liberties reveals another dimension of the question of social learning. These actions include detention of resident aliens for suspected visa violations, nondisclosure of the names of those detained, deportations when violations were found, and seemingly intrusive invitations by federal agents to members of Arab American communities to discuss what they

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knew about potential terrorist activities in their communities. n85 Putting aside the question of whether any of these actions should be treated as threats to civil liberties, I would focus on the fact that the threats have affected almost exclusively non-citizen residents in the United States. Some, it turns out, had violated immigration laws. These law-violators were subjected to deportation when their violations, prior to September 11, would not have led to such action - at least not immediately. The government simply changed its previous policy of respectful consideration of a law-violator's personal circumstances. While perhaps not the policy best suited to a humane government, this does not seem to be a violation of civil liberties.

## **DETENTION POLICIES HAVE NOT SPILLED OVER TO RESTRICTIONS ON CIVIL LIBERTIES OF US CITIZENS**

Mark Tushnet, Professor of Constitutional Law, Georgetown University Law Center, 2003, Wisconsin Law Review, 2003 Wis. L. Rev. 273, p. 297

In some instances, the actions taken might be true violations of civil liberties. But, again, they are violations of the rights of residents who are not U.S. citizens. David Cole argues that such violations might have spill-over effects on the rights of citizens. n86 That is, once we get accustomed to these actions when taken against non-citizens, we will be more comfortable about extending them to citizens. n87 That may be true, but the threat to citizens has not yet materialized, except, as I have suggested, in connection with the detentions of citizens as members of an enemy army. In Cole's words: "Measures initially targeted at non-citizens may well come back to haunt us all." n88 My claim about social learning is that, while the possibility Cole identifies is a real one, its magnitude is smaller than he suggests.

## **DETENTIONS ARE REASONABLE AND APPROPRIATE**

Kentucky Law Journal, 2001 / 2002, 90 Ky. L.J. 1089, p. 1092-3

This Note examines the constitutionality of detentions in the wake of September 11th. Part I presents the background on the detainees associated with the investigation of the September 11th attacks and provides a general framework for constitutional seizures and the legality of detainment. n16 Part II addresses the Bail Reform Act, n17 which gives prosecutors the ability to [\*1093]detain material witnesses; the constitutionality of this portion of the Act has never been litigated. n18 Part III examines the constitutionality of detaining those immigrants who are only suspected to have information relevant to the investigations of the September 11th tragedy. This loosely defined category of "suspects" begs a closer look at the need for probable cause and whether that standard has been met. n19 Part IV probes detainment based on minor offenses unrelated to terrorism. n20 Part V explores the provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") passed on October 26, 2001, addressing the detainment period for foreign nationals. n21 Part VI asks whether the threat terrorism poses to our country is sufficient to justify encroachments upon our civil liberties by reviewing historical precedent for infringing upon civil liberties during times of war and considering issues of national security. n22 This Note concludes that the reasonableness of a seizure should be considered in light of national instability and that the current detentions are acceptable based on a shifting perception and understanding of what is reasonable. n23

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## **Detention Key to Preventing Terrorist Attacks**

### **TERRORISTS REQUIRE INCAPACITATION – NOT SUBJECT TO DETERRENCE**

**Dru Stevenson**, Professor of Law, South Texas College of Law, Stanford Law & Policy Review, 2011, “Effect of the National Security Paradigm on Criminal Law,” p.

Second, incapacitation, or making crimes less feasible to commit, is replacing the tactic of detering through threatened punishments. There seems to be a consensus that terrorists are impervious to classic deterrence because they are not afraid of punishment. The symbol of the clever suicide bomber, who spends months in flight lessons or learning about pyrotechnics, has shattered the traditional view of criminals as impulsive, antisocial, and supremely selfish. Punishment twists into martyrdom. Disincentives for terrorists are on the front end of the equation, increasing the transaction costs of committing the act or raising the risk of botching the job, rather than offsetting the presumed rewards with a possible penalty, as we have done in the past. The new paradigm is more concerned with lowering the chances of success than discouraging the behavior through threats. Terrorism has proved impervious to traditional criminal prohibitions and deterrence, so increasingly the United Nations and the federal government have called for indirect measures that seek to make commission of the crime less feasible. Indirect rules attacking the funding sources or the ability of criminals to communicate secretly, travel easily from place to place, get information about targets, or obtain weapons, are the favored means in combating terrorism. Typical is the call from Professor Roach, who suggests: The Patriot Act conferred more authority and discretion on federal law enforcement officials, and on the executive branch generally. Most of the increased authority pertains to gathering information, such as surveillance or authority to demand voluntary disclosure of information. Data mining is one important issue. Information-related discretion is the most obvious pro-government discretionary shift in anti-terrorism and other newer penal statutes, but the effect is not boundless.

### **STRONG DETENTION AND SEARCH AUTHORITY IS CRITICAL TO PREVENTING TERRORISM**

**Amitai Etzioni**, **GWU Sociology Prof, 2002**, [USA Today, "Throw Book at Terrorists Who Act as Civilians," 7/3, <http://www.gwu.edu/~ccps/etzioni/B395.html>]

What the USA faces today are a bunch of freelancers and self-appointed warriors whose leaders hide in caves or remote villages.

Civilian clothes, as my experience highlights, greatly benefit the attacker, an advantage we as a country must deal with by almost any means necessary, or our homeland protection will come to naught. In fact, many of the indignities we must contend with these days when we travel by air or enter numerous public buildings are a direct result of the threat of terrorists hiding behind civilian clothing. We would not have to show photo IDs or be randomly searched if they abided by long-established and widely observed rules of warfare. In other words, if they fought us like upstanding soldiers. The British had every right to throw the book at me then, just as the United States today has the same right to deal forcefully with terrorists who masquerade as civilians, such as potential "dirty bomber" Jose Padilla and other al-Qaeda operatives. Legally, there's a big difference between an enemy wearing a soldier's uniform representing his country and a terrorist in civilian's clothing. The soldier, under the Geneva Convention, has certain rights. But a terrorist -- foreign or American born -- who tries to harm innocent people has next to none, in my mind. The U.S. Justice Department argued this very point in a brief to an appeals court about enemy combatants. U.S. officials said these prisoners have no right to a lawyer and can be held indefinitely and that civilian courts cannot intervene. Similar authority will likely be used against Padilla, also declared an enemy combatant. Or take Richard Reid, the would-be shoe bomber. The only way to deter this kind of assault (worse than mine, because he attacked civilians, not as unavoidable collateral damage, but as his sole target) is to severely punish such terrorists, something the Justice Department has attempted to do with Reid. We are also quite justified in monitoring his conversations with his lawyer for security reasons, to ensure that the lawyer will not be used to transmit messages to other terrorists ready to strike. Moreover, lawyers should be chosen from a list of those cleared to see some classified information. Lawyers, including Reid's public defenders, draw numerous fine distinctions: among unlawful combatants, prisoners of war and visa over-stayers; between airplanes and "mass transportation vehicles." But my concerns are much more basic. For Reid (and for his ilk), we need to establish the fundamental facts that he is the guy who tried to set off the bomb on that flight -- two witnesses will do -- and that he is not insane. (That he planned the attack for months is proof positive.) As I see it, under no circumstance should we endanger our national security, whether our agents or foreign sources, to accommodate some legalistic notion of a supposedly fair trial. When terrorists attack as civilians and seek to kill civilians, they put themselves far outside the protection of the law -- national and international.

### **DETAINMENTS INCREASE PROTECTION AGAINST TERRORIST ATTACKS— THEY ARE JUSTIFIED.**

**Kentucky Law Journal, 2002**, [Whitney Frazier, “The Constitutionality of Detainment in the Wake of September 11th,” LN]

Although reasons for detainment raise constitutional questions, these detainments must be upheld and supported by our nation as an effort to defeat terrorism and prevent a major public health crisis, despite the perceived lack of constitutionality of the laws and acts under our current definitions of reasonableness. The boundaries of probable cause and reasonableness must not be

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rigidly set. Instead, they must be adapted to circumstances facing our nation. While civil libertarians question the validity of the detainments and question the need for such emphatic secrecy, the nation must stand behind our law enforcement agencies and trust that their actions will maintain the best interests of the nation. The detainments resulting from the investigation into the events of September 11th should not be perceived by the public as unreasonable or unconstitutional seizures. The tragedy of that day has forced citizens of the United States to redefine our patriotism, to question the vulnerability of our nation's borders, and to be willing to allow a slight encroachment into individual civil liberties so that America may be free from terror. The security of the United States has been penetrated by terrorists and the government must have power under the Constitution to take all measures to restore a sense of security to the population of the United States. Our current definition of reasonableness does not include the length and types of detentions resulting from the investigation into the attacks of September 11th; it is the current lawmakers' and judiciary's responsibility to redefine what is reasonable. Although these seizures are unconstitutional under traditional notions of reasonableness, such detainments are imperative in the wake of the vulnerable and shifting state of the nation.

#### **DETENTION OF TERRORIST SUSPECTS JUSTIFIED – CRITICAL TO EFFORT TO PREVENT FUTURE ATTACKS.**

George C. Harris, Attorney, 2003, [Loyola of Los Angeles International & Comparative Law Review, p. 36]

Secretary Rumsfeld and other administration spokespersons articulate two main prongs to the prevention rationale. First, preventing future attacks requires gathering intelligence from the suspect. Treating the detainee as a criminal suspect, including the requirements of probable cause for continuing detention and advice of right to counsel, would interfere with this effort. Second, the government asserts the general prisoner of war (POW) rationale - detention prevents the suspect from rejoining the enemy and replenishing the enemy's ranks. Implicit in the prevention rationale is the conclusion that principles fundamental to our criminal justice system (including due process, the presumption of innocence, and the right to counsel) are inconsistent with, and encumber too much, the goal of preventing future acts of terrorism.

#### **INDEFINITE DETENTION BOLSTERS TERRORIST CRIMINAL INVESTIGATIONS NEW YORK LAW SCHOOL REVIEW, 2003, [Fall, P. 414, LN]**

The first justification behind 412 of the Patriot Act is that it allows the Department of Justice to continuously investigate individuals it reasonably believes may have involvement in terrorism. In essence, mass detention of terrorist suspects will assist authorities in the largest criminal investigation in U.S. history. The complexity of the case requires officials to hold on to anyone who may have information, especially if that person already is living illegally in the United States.

#### **MANDATORY DETENTION OF NON-CITIZEN TERRORIST SUSPECTS KEY TO REDUCING TERRORISM RISK**

FLORIDA JOURNAL OF INTERNATIONAL LAW, June 2004, p. 412-3

First, mandatory detention saves money because it avoids the expense of individualized hearings. The government has limited resources and cannot afford to do a case-by-case adjudication of each noncitizen who is suspected of being a terrorist. Second, mandatory detention diminishes the possibility of errors that arise when a detention determination is done on a case-by-case basis. Predictions about the threat of a person to the public's safety or the individual's likeliness to disappear are inherently risky. Often in the course of an individualized hearing, not all the evidence will be discovered or presented and the findings of fact may not be accurate. In essence, mandatory detention, by eliminating the risk of prosecutorial error, protects the public more thoroughly. Finally, mandatory detention deters further immigration violations.

#### **DETENTION POWERS INCREASES GOVERNMENT FLEXIBILITY IN ADDRESSING TERRORIST RISK**

Victor Romero, Professor of Law, Penn State, The Dickinson School of Law, JOURNAL OF GENDER, RACE, AND JUSTICE, Spring 2003, pp. 203-4

Why, then, has Attorney General Ashcroft used immigration proceedings to seek out terrorists? Following the September 11 attacks, the Immigration and Naturalization Service (INS) arrested and detained approximately one thousand mostly Arab and Muslim noncitizens for immigration code violations in an effort to uncover possible terrorists among them. Notwithstanding the questionable desirability of deporting a known terrorist, using immigration rather than criminal proceedings to screen persons makes sense from the government's perspective. First, the process gives the government the most number of

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remedial options: if it decides a noncitizen is not a terrorist, it can deport her; if she is a terrorist, it can charge her criminally. In addition, the government is able to take advantage of the administrative and civil nature of immigration proceedings to aggressively prosecute its claims without providing as much due process protection to the individuals charged. For example, because attorneys are not automatically provided to noncitizens in deportation proceedings, the government is at a distinct advantage in investigating possible terrorist links in the context of deportation than if it had to proceed in a criminal court.

## **Detention Should Be Viewed Under Military Framework**

### **CHARACTERIZING GITMO DETENTIONS AS “WITHOUT CHARGE” INAPPROPRIATELY PUTS THEM IN THE CRIMINAL JUSTICE FRAMEWORK\***

**Former Attorneys General of the US, et al, Amici Brief, Rasul v Bush, 2003 U.S. Briefs 334, March 3, 2004, p. 11-2\***

Throughout their briefs, petitioners use the language of the criminal law and rely upon principles developed in the context of criminal prosecution. Thus, petitioners argue that they are detained, "without charges, trial, access to counsel or the courts or process of any kind." Rasul Br. at 9. They claim they are "innocent of any wrongdoing," id., and seek to require the Executive to establish an individualized factual predicate for their detention, as is required for pre-trial detainees. Al Odah Br. at 14 n.14.

They alternatively invoke the protections of the Fourth, Fifth, and Sixth Amendments. See, e.g., Rasul Br. at 2 (right of grand jury indictment and right to counsel); id. at 17 n.18 (Fourth Amendment rights regarding seizure of the person (citing Gerstein v. Pugh, 420 U.S. 103 (1975)), and due process protections afforded to criminal defendants subject to pretrial detention (citing United States v. Salerno, 481 U.S. 739 (1987))). The Al Odah petitioners would have this Court find rights to counsel, visitation rights, and "access to an impartial tribunal to review whether any basis exists for their continued imprisonment," Al Odah Br. at 4-8, in the Due Process Clause of the Fifth Amendment.

In laying claim to these rights, petitioners ignore two critical legal principles. First, petitioners are not being detained pursuant to the Executive's domestic authority to punish them for any past violations of the criminal law. Their detention as enemy combatants is a tool of war, utilized by the Commander-in-Chief and his military subordinates to advance an ongoing military operation by preventing petitioners from rejoining the conflict or otherwise undermining our military and strategic goals.

Second, petitioners have no "substantial connections with this country," Verdugo-Urquidez, 494 U.S. at 271, that would allow them to claim the protection of the Bill of Rights. They have never attempted voluntarily to place themselves in any relation with the domestic body politic, and their only connection to the United States is that they were confronted by American military forces on the field of battle. They had no constitutional rights on the field of battle itself, and their capture by our military did not vest them with any such rights. See id. at 275 (Kennedy, J. concurring) ("the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory"). n7

## **AT: “Violates International Law”**

### **INTERNATIONAL LAW DOES NOT PROHIBIT THE INDEFINITE DETENTION OF COMBATANTS**

Tung **Yin, law professor, Lewis & Clark**, Harvard Journal of Law & Public Policy, Spring **2011**, “**PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,**” p. 457

The absence of an international equivalent of the *Hamdi* decision makes it harder to demonstrate conclusively that President Bush's decision to detain captured al Qaeda and Taliban fighters as enemy combatants was not a mistake. Nevertheless, there are reasons to doubt that indefinite military detention of such persons is a per se violation of international law. The International Committee of the Red Cross has, after a five-year study, concluded that in a noninternational armed conflict--which is how the Supreme Court characterized the war against al Qaeda in *Hamdan v. Rumsfeld* --members of nonstate groups can be targeted as combatants where they have a "continuous combat function." Targeting is not the same as detaining, but it would be anomalous to allow a nation to shoot non-state actors engaged in a continuous combat function but not to detain them should they be captured.

### **DOMESTIC AND INTERNATIONAL LAW PERMIT THE DETENTION OF NON-STATE ACTORS**

Tung **Yin, law professor, Lewis & Clark**, Harvard Journal of Law & Public Policy, Spring **2011**, “**PRESIDENT OBAMA'S FIRST TWO YEARS: A LEGAL REFLECTION: "ANYTHING BUT BUSH?": THE OBAMA ADMINISTRATION AND GUANTANAMO BAY,**” p. 457

President Obama has not deviated from his predecessor's legal position regarding the legality of military detention of non-state actors such as al Qaeda members. It does not appear to have been a legal mistake, as domestic law clearly permits the President to detain persons pursuant to the Authorization for Use of Military Force (AUMF), and international law appears to permit it as well.

### **INTERNATIONAL LAW FACILITATES POST-COLONIAL AND IMPERIAL CONTROL**

Ernesto **Hernandez-Lopez, law professor, Chapman, 2011**, National Security, Civil Liberties, and the War on Terror, ed. Katherine Darmer and Richard Fybel, p. 58-9

International law had a central role in extending imperial and post-colonial control around the globe. International law seeks to order the obligations and rights in foreign relations belonging to states and individuals. With states extending their influence overseas, this set of legal doctrines alternatively justified, facilitated, or resisted imperial influence. Post-colonial perspectives critically examine both international law's assumptions and its limitations (past, present, and future). Norms and doctrines in international law are based on previous state practices. These practices are often an outgrowth of European states, or more powerful states, expanding their influence worldwide and seeking economic and territorial gain. From its genesis, international law developed from these contexts of empire, colonization, and protectorates.

## **AT: “Detention Motivates/Increases Terrorism”**

### **NO EVIDENCE THAT GUANTANAMO IS ACTUALLY A RECRUITING TOOL**

Gregory McNeil, law professor, Pepperdine, Summer 2011, Journal of Criminal Law & Criminology, Preventive Detention: The Status Quo Bias and Counterterrorism Detention, p.

The main argument made by think tanks in support of preventive detention and in opposition to the notion that Guantanamo serves as a recruiting tool is that Guantanamo is rarely mentioned in the messages delivered by top al Qaeda leaders. Assuming that the list of collected statements and interviews from top al Qaeda leaders are representative of al Qaeda's recruiting propaganda, <sup>43</sup> those past statements reveal that top al Qaeda officials rarely mention preventive detention or Guantanamo. Moreover, even in the messages where Guantanamo is referenced, it is incorrectly conflated with Abu Ghraib (though this does not necessarily preclude the fact that preventive detention may act as a recruiting tool) and when mentioned it is mentioned very briefly. For example, Dr. Ayman al-Zawahiri, one of al Qaeda's top strategists, gave a twelve-page statement entitled "Nine Years After the Start of the Crusader Campaign" with four pages devoted to Pakistan, two pages to Afghanistan, nearly two to Egypt, two to Palestinians, and two to al Qaeda's prospects for victory. In this same statement, only a single sentence mentioned how the Koran was desecrated in Guantanamo, Iraq, and elsewhere. In fact, a keyword search of all the messages by top al Qaeda leaders yielded only seven mentions of Guantanamo, while there are numerous more mentions of words like Israel/Israeli/Israelis (ninety-eight mentions), Jew/Jews (ninety-four mentions), Zionist(s) (ninety-four mentions), and other words that focus on the overall Zionist-Crusader conspiracy narrative against Muslims.

## **\*Racism Answers\***

## **Anti-Terrorism Policies Not Racist**

### **GOVERNMENT HAS BEEN CAREFUL NOT TO USE RACIAL STEREOTYPES IN THE WAR ON TERRORISM**

Daniel M. Filler, Associate Professor, University of Alabama School of Law, 2003, Virginia Journal of Social Policy & the Law, 10 Va. J. Soc. Pol'y & L. 345, p. 368-9

The Administration and the media may have had a number of reasons for urging such caution. First, they may have honestly believed this to be morally correct advice. Americans are now very sensitive to racial classifications and stereotyping, a sensitivity produced by the Civil Rights movement, modern critiques of such race-based legal policies as internment of Japanese citizens during World War II, and the radical increase in national diversity - and particularly racial and ethnic diversity - that has occurred since the Second World War. Second, the Administration may have realized that any war against terrorism would require the help of many Muslim nations, including, most prominently, Pakistan and Saudi Arabia. Demonization of Muslims by the administration, or even by high-profile individuals outside of government, could produce serious international political difficulties. n137 Finally, some may have called for restraint out of their own wariness of spurring a moral panic. n138

Since September 11th, the government has implemented few policies explicitly classifying individuals based on race or religion. That is not to say that Muslims have escaped special scrutiny. To the contrary, the Department of Justice targeted Mosques for special surveillance n139 and the government interviewed thousands of Muslims, detaining hundreds of non-citizens on immigration violations. n140 The Immigration and Naturalization Service focused special scrutiny on visitors from particular Muslim nations. Without diminishing serious concerns about these policies, however, their impact has been limited to a relatively small number of individuals, particularly in comparison with World War II internment. n141 Most importantly, it appears that the government based its detention decisions on individualized assessments of risk, rather than on simple race, ethnic, or religious classifications. n142

### **“RACIAL PROFILING” IN OUR ANTI-TERRORISM CAMPAIGN NOT AKIN TO INTERNMENT OF JAPANESE AMERICANS**

Jan C. Ting, Professor of Law, Temple University, 2002, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1153-4

And, let us not accept false analogies to the egregious Japanese internment during World War II. Our outrage about that event is appropriately focused on the fact that two-thirds of those interned, without any due process or showing of reasonable cause, were, in fact, American citizens. The current requests for temporary foreign visitors to submit themselves voluntarily for questioning are in no way analogous. The detention of aliens charged with specific criminal or immigration law violations, or held as as material witnesses pursuant to orders issued by federal courts is in no way analogous. Searches of homes, businesses, and charities, pursuant to search warrants issued by federal courts in response to a showing of probable cause to believe that criminal activity had occurred are in no way analogous.

### **FBI IS CAREFUL TO AVOID RACIAL PROFILING IN TERRORISM INVESTIGATIONS**

Robert S. Mueller, III, Director, FBI, 2003, Stanford Journal of International Law, 39 Stan. J Int'l L. 117, p. 122-3

The answer to these and many similar questions, I believe, in part, is to assure that for us there is an adequate predication for each step of an investigation. We do not target individuals or groups by reason of their country of origin or nationality. Rather, we take investigative steps when there is a factual basis justifying that step. Can we be too aggressive? Or in the post-September 11 world, is there such a thing as "too aggressive?" I would say, yes, I believe there is. But by assuring that there is adequate predication for each step of an investigation, we protect against overaggressiveness and avoid the excesses of the past.

### **SIGNIFICANT DIFFERENCES BETWEEN JAPANESE AND JAPANESE AMERICANS IN 1942 AND ARABS AND MUSLIMS IN AMERICA TODAY—MUCH LESS LIKELY TO BE TARGETED BY GOVERNMENT POLICIES**

Eric Muller, Professor, University of North Carolina School of Law, 2002, West Virginia Law Review, 104 W. Va L. Rev. 571, p. 582-4

A second important difference between 1942 and 2002 is the difference between the targeted minorities. Japanese Americans were not singled out for uniquely illegal treatment during World War II just because the image of the Asian in American culture more easily conjured up images of treachery than the image of the German or the Italian. They were also uniquely isolated and vulnerable in every important way. They



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were geographically concentrated in a way that German and Italian Americans were not; nearly ninety-five percent of the ethnically Japanese people in the continental United States at the start of World War II lived in a narrow strip along the Pacific, where the perceived danger of a Japanese attack was greatest. Japanese Americans, as a group, were also economically powerless. They were primarily farmers, although some owned or worked in small retail stores and some worked in relatively low-paying service [\*583]industries. There was not a single Japanese American in elective public office. And most of Japanese America lacked the franchise: The immigrant generation, forbidden by law from naturalizing as citizens, remained aliens and could not vote. And most of their children, although born in this country, had not yet turned eighteen by 1942. n54

More importantly, Japanese Americans were especially attractive targets for mistreatment because they had long been the victims of vicious economic discrimination in the states where they lived. By the 1930s and early 1940s, the Japanese had become very successful farmers up and down the West Coast, often tilling land that had been thought unsuited for commercial agriculture. They were, quite simply, the envy of their white competitors. For years before Pearl Harbor, a combination of white nativists and agricultural competitors had lobbied, often successfully, for laws that would prevent Japanese immigrants from owning land themselves and even from holding it as guardians for their U.S. citizen children. For these interests, the Japanese attack on Pearl Harbor was, in at least one sense, a dream come true: it gave them the opportunity to push for the out-and-out eviction of their Japanese competitors. Nativist groups and the agricultural lobby were among the earliest and most vocal supporters of the exclusion of Japanese Americans from the West Coast. Thus, the eviction and internment of Japanese Americans can really be understood not so much as a military necessity as the capstone of a long campaign of economic discrimination. n55

Arab and Muslim Americans, by contrast, are happily not so easy or attractive a target. They are dispersed across the American landscape, both geographically and economically. Arab Americans are not concentrated in one narrow region; indeed, to the extent that the Arab American population is concentrated at all, it is in three regions that span the nation-- Los Angeles, Detroit, and New York. n56 Roughly a third of the Arab American population lives in or near those three urban areas, while another third is scattered across seven other states. n57 Arab and Muslim Americans are also an economically diverse group. A recent poll shows that half of American Muslims earn over \$50,000 per year, and 58 percent are college graduates. n58 Arab Americans have a median income that is higher than the national average. n59 About sixty percent of working Arab Americans are business executives, professionals, and office and sales staff. n60 And finally, Arab Americans claim a number of prominent political leaders among their number, including former U.S. Senate Majority Leader George Mitchell, current Energy Secretary and former U.S. Senator Spencer Abraham, former Secretary of Health and Human Services Donna Shalala, current New Hampshire Governor Jeanne Shaheen, former New Hampshire Governor and White House Chief of Staff John Sununu, and 2000 presidential candidate Ralph Nader. n61

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### **\*Exceptionalism Turn\***

## Link: Viewing Terror Suspect Abuses as Exceptional Masks Systemic Violence

**WE SHOULD NOT BE SURPRISED AT THE TORTURE THAT OCCURS AT BAGRAM AIR BASE—IT IS ONLY SYMPTOMATIC OF A LARGER REGIME OF DISCIPLINE PLAINLY SEEN IN THE AMERICAN CARCERAL SYSTEM. WE MUST ABSOLUTELY REFUSE THE RHETORIC OF OUTRAGE AND EXCEPTION TO EXPOSE THE VIOLENCE AT THE HEART OF MODERN DEMOCRACIES.**

WHITMER, TEACHES ETHNIC STUDIES AT THE UNIVERSITY OF COLORADO-BOULDER, 2006 [BENJAMIN, “‘TORTURE CHAMBERS AND RAPE ROOMS’ WHAT ABU GHRAIB CAN TELL US ABOUT THE AMERICAN CARCERAL SYSTEM,” *CR: THE NEW CENTENNIAL REVIEW* 6.1 | PROJECT MUSE]

In 1975, French prison activist and philosopher Michel Foucault published *Discipline and Punish: The Birth of the Prison*, chronicling constructions of power and knowledge in modern European carcerality. It is a text that has given birth to an entire range of philosophies and social theories. It is also a critical text for understanding the American carceral, though, as with [End Page 175] many critical texts, it often provides a greater understanding in the ways it fails than in the ways it succeeds.

Discipline and Punish begins with the movement from public torture to incarceration as the ruling form of civil punishment. Contrary to popular belief, it was not based on any enlightened compassion for the punished. Instead, it arose from the understanding that in punishment-as-spectacle a confused horror spread from the scaffold; it enveloped both executioner and condemned; and, although it was always ready to invert the shame inflicted on the victim into pity or glory, it often turned the legal violence of the executioner into shame. Now the scandal and the light are to be distributed differently; it is the conviction itself that marks the offender with the unequivocally negative sign: the publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man: so it keeps its distance from the act. (Foucault 1995, 9)

Modern prisons, Foucault contends, exist as a kind of mausoleum, burying power's culpability in punishment to remove the "public responsibility for the violence that is bound up with its practice" (1995, 9). It follows, as Foucault tells us, that modern prisons mark a line between pure punishment and the concept of rehabilitation, introduced to reform prisoners into repentant citizens. Rehabilitation, of course, is considered to be much more humane, to all but the prisoners, as the shame of the executioner is transmuted into the shame of the defective nature of the prisoners, necessitating their normalization.

This is the first of the carceral's dirty secrets: thanks to the modern desire "to correct, reclaim, 'cure'" (Foucault 1995, 10), the prison industry has only expanded its mutilations. The prison, unlike the stocks and the chopping block, involves "a certain discretion in the art of inflicting pain, a combination of more subtle, more subdued sufferings, deprived of their visual display" (8). The carceral no longer hacks the hands off its thieves: in this enlightened time, it works to cure them by mangling the soul and vivisectioning [End Page 176] the "heart, the thoughts, the will, the inclinations" (16). Power has come to understand that the limits of bodily torture are finite, so it has advanced to a far more expansive butchery, using "the cellular prison, with its regular chronologies, forced labour, its authorities of surveillance and registration, its experts in normality" (227-28), all "intended to render individuals docile and useful" (231), to groom the imprisoned into willing recipients of the prison's normative hierarchies.

Prisons have always been understood by the prison writer. Fyodor Dostoevsky writes that one of the most draconian forms of prisoner reclamation—solitary confinement—“sucks the vital sap from a man, enervates his soul, weakens it, intimidates it and then presents the withered mummy, the semi-lunatic as a model of reform and repentance” (1986, 10). Even that most apolitical of European writers, Oscar Wilde, couldn't help but note the torturous nature of his regimented cure. His prison memoir, *De Profundis*, is little more than a strangled howl against the “the plank bed, the loathsome food, the hard ropes shredded into oakum till one's finger-tips grow dull with pain, the menial offices with which each day begins and finishes, the harsh orders that routine seems to necessitate, the dreadful dress that makes sorrow grotesque to look at, the silence, the solitude, the shame” (147). His is the experience Foucault writes of—the steady discipline, enforced isolation, and constant surveillance that serve to cultivate the model prisoner, and hence, model citizen.

More gruesome is the expansion of hierarchical judgment implicit in this process. As modern psychology strips away the human identity to create a conjunction of psychosomatic symptoms, so does the modern prison strip away the human being to create a criminal in need of normalizing. so the prisoner is continually observed, examined, classified according to a hierarchy of norms and judged:

All the great movements of extension that characterize modern penalty—the problematization of the criminal behind his crime, the concern with a punishment that is a correction, a therapy, a normalization, the division of the act of judgement between various authorities that are supposed to measure, [End Page 177] assess, diagnose, cure, transform individuals—all this betrays the penetration of the disciplinary examination into the judicial inquisition. (Foucault 1995, 227)

In its most obvious form, this is the parole process. But it is also every one of the millions of interactions the prisoner has with power in all its minutiae, from the organization of the workhouse, to the layout of the exercise yard, to the inmate's movement through the corridors. Since the prisoner lives every moment of prison life in a state of perpetual surveillance, the prisoner also lives in a state of perpetual examination. This can only serve to extinguish the prisoner's identity, as it is meant to. “When first I was put into prison some people advised me to try and forget who I was,” Oscar Wilde writes. “It was ruinous advice” (1976, 147).

All of these techniques should seem familiar, at least to anyone paying attention to the stories and photographs leaked out of Abu Ghraib. This dedication to the extinguishing of a prisoner's identity is exactly the purpose of the institution, to groom the prisoners into willing accessories in their own violation, to manhandle them into compliance with their captors. One might ask how a culture that purports to value individual freedom could countenance these techniques, whether at home or abroad. Foucault gives us the answer.

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The self-evidence of the prison is also based on its role, supposed or demanded, as an apparatus for transforming individuals. How could the prison not be immediately accepted when, by locking up, retraining and rendering docile, it merely reproduces, with a little more emphasis, all the mechanisms that are to be found in the social body? The prison is like a rather disciplined barracks, a strict school, a dark workshop, but not qualitatively different. (Foucault 1995, 233)

In other words, the carceral only reproduces the social, in a slightly more concentrated form. It provides

the hierarchical model not only for what is within its walls but also for what it is without. As Foucault

asks us, "is it surprising that prisons resemble factories, schools, barracks, hospitals, which [End Page 178]

all resemble prisons?" (1995, 228). As members of society, we are to operate under the illusion we are

free, but it is a freedom that only survives to the point of its questioning As Ward Churchill reminded his audience

in a speech at the First Congregational Church of Oakland, February 22, 2003: "You are free. You are a free people. You are free to do exactly what you're told every given moment of every single day." After all,

The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social-worker'-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behaviour, his aptitudes, his achievements. (Foucault 1995, 304)

As such, prisons serve a dual symbolic function for the social. First, they provide an example of the consequences of resistance, giving continuity to the techniques they replicate into the schools,

factories, and cubicle farms. The prison, with its many diffuse or compact forms, its institutions of supervision or constraint, of discreet surveillance and insistent coercion, assured the communication of punishments according to quality and quantity; it connected in series or disposed according to subtle divisions the minor and the serious penalties, the mild and the strict forms of punishment, bad marks and light sentences. You will end up on the convict-ship, the slightest indiscipline seems to say. (Foucault 1995, 299)

No one understands this better than schoolchildren, particularly those who have any semblance of will left to resist normalization. They are constantly reminded that it is a short walk from the detention hall to the prison yard. My generation had to sit through episodes of the unspeakably inane series *Scared Straight* more times than I can count.

Second, prisons exist, in the words of Jean Baudrillard, "to conceal the fact that it is the social sphere in its

entirety, in its banal omnipresence, which is carceral" (1995, 25). They provide us the necessary

illusion that as [End Page 179] long as we are outside the prison, we are free, that the same carceral

techniques and hierarchies of normalization do not exist in the social arena. Consequently, it is no surprise that the most dynamic critiques of the social sphere come from behind prison walls. As every prisoner knows, power depends solely on force for the regimentation of its citizens. Beneath all of the humanist rhetoric and legal philosophy, there is nothing more enlightening

than a nightstick and a gun.

Abu Ghraib can provide us with this essential insight also but only if we refuse the rhetoric of

outrage. We are provided this insight only if we refuse to understand the tortures we saw

there as abuses. For when Abu Ghraib is considered with the internal prison system of the United States in mind, the similarities are far more prevalent than the differences.

**MOREOVER, UNDERSTANDING THE SITUATION IN BAGRAM AS ABUSE LEGITIMIZES THE ENTIRE AMERICAN CARCERAL SYSTEM. TO RELEGATE THE PROBLEM OF TORTURE TO ANOTHER LOCATION WASHES OVER THE DOMESTIC ACTS OF COMPLETE DEHUMANIZATION.**

**WHITMER, TEACHES ETHNIC STUDIES AT THE UNIVERSITY OF COLORADO-BOULDER, 2006 [BENJAMIN, "TORTURE CHAMBERS AND RAPE ROOMS' WHAT ABU GHRAIB CAN TELL US ABOUT THE AMERICAN CARCERAL SYSTEM," *CR: THE NEW CENTENNIAL REVIEW* 6.1 | PROJECT MUSE]**

Predictably, we have heard more of the brutality in Abu Ghraib in the last year than we have heard of

in prisons internal to the United States in the last decade. In both cases, the carceral relies on the

forced silence of the imprisoned, with freedom of speech being one of many constitutional rights

revoked. As such, we find Bill Clinton, Janet Reno, George Bush, and John Ashcroft in lockstep support of a

constitutional amendment to remove any and all rights for U.S. prisoners to publish.<sup>5</sup> Likewise, prisoners who

violate the silence of their cells are dealt with accordingly. Mumia Abu Jamal's Live from Death Row, for

instance, earned the author a stint in "the most punitive section that the system allows" of his supermax prison. In his own words:

Clearly, what the government wants is not just death, but silence. A "correct" inmate is a silent one. One who

speaks, writes, and exposes horror for what it is, is given a "misconduct." Is that a correct system? A system of corrections? In this department of state government, the First Amendment is a nullity. It doesn't apply. (2003, 1-

2)

It is not only legislation and institutional reprisal that create the silence of American prisons. There

is also exactly what we saw with the reaction to Abu Ghraib: an insistence that things like rape

rooms and torture chambers only happen over there somewhere, off in despotic third-world

regimes. An unyieldingly dogged faith maintains that no matter how endemic, how [End Page 190]

pervasive, or how deliberate, when such things happen here, they are only to be conceived of as

exceptions that prove the rule.

In one of his most compelling essays, Jean Baudrillard writes of the Watergate scandal:

The denunciation of scandal always pays homage to the law. And Watergate above all succeeded in imposing the idea that Watergate was a scandal . . . capital, immoral and without scruples, can only function behind a moral superstructure, and whoever revives this public morality (by indignation, denunciation, etc.) works spontaneously for the order of capital. (Baudrillard 1995, 14)

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It is a concept that fits perfectly with American media's coverage of the Abu Ghraib scandal. The outcry emanating from the liberal press has done nothing so much as to reinvigorate the American carceral, with all its everyday tortures and psychosexual pathology, by establishing a false sense of moral boundaries. Far from criticizing torture and rape, it has provided the carceral with exactly the cover necessary to operate unchallenged.

To see the abuses of Abu Ghraib as abuses is to ignore the American carceral as the core of the American social order. It is to ignore the sexual psychopathology replicated hourly on the bodies and minds of prisoners in the United States. This is not to say journalists should not have covered these atrocities, but to portray them as anomalies is to misunderstand them entirely. As Slavoj Žižek writes, "[w]hat we get when we see the photos of humiliated Iraqi prisoners is precisely a direct insight into 'American values,' into the core of an obscene enjoyment that sustains the American way of life" (2004b).

Attempting to correct them as abuses is also futile. There are not moral boundaries to be discovered. To attempt to remove torture and rape from the American carceral is to attempt to remove a structure's foundation, while maintaining its walls. There is no fix. The American carceral doesn't operate by rules that allow the imposition of a kinder, gentler version of itself. It is too greatly intertwined with the interests of capital, from the Foucaultian understanding that the social system itself is only a replication [End Page 191] of the carceral: to the nation-building processes of slavery and wage-slavery H. Bruce Franklin lays out, to the colonial usages Ward Churchill describes, to the demarcation of class and social boundaries Jeffrey Reiman proposes. Likewise, as authors as various as Eldridge Cleaver and Slavoj Žižek point out, America's entire symbolic order depends on the sexual psychopathology that creates our Abu Ghraibs.

None of this can be a surprise to the journalists decrying the abuses of Abu Ghraib. It is impossible to believe Seymour Hersh or Donald P. Gregg could have known so little of the American prison system as to imagine that anything at Abu Ghraib was out of the ordinary. Nor could they have been naïve enough to believe that the spectacle of sexually humiliated Arabs can shock the American public. The scandal, such as it was, was almost entirely a media creation. There was next to no public outcry from the U.S. citizenry for anything like justice for the victims, nor, for that matter, from the U.S. media.

The reason for this is fairly simple: the victims are not the point. Donald Gregg's New York Times article made this perfectly clear. The Abu Ghraib scandal only exists in how it "devastatingly undercut America's standing in the world, or, more important, our view of ourselves" (qtd. in Dratel and Greenberg 2005, xvi).

The interests of the victims are not at stake. What is at stake is purely ideological, a reaffirmation of American values. Just as with Bush, Gregg's point is that the victims only exist in how they will be allowed to represent the United States. No matter how many stories are to come out of Abu Ghraib telling of the rape, murder, and torture of kidnapped Arabs, the world is not going to forget that the United States is a nation of laws, deeply committed to individual liberty and human rights.

Even if all evidence stands to the contrary.

#### **THE WITHDRAWAL OF TORTURE FROM PUBLIC DISCOURSE ONLY ALLOWS THE STATE TO RENEGOTIATE THE THRESHOLD OF "ACCEPTABLE VIOLENCE"—TURNS CASE.**

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[JINEE, "TORTURE DEBATES IN THE POST-9/11 UNITED STATES: LAW, VIOLENCE, AND GOVERNMENTALITY," *THEORY & EVENT* 13:1 | PROJECT MUSE]

A significant question that is neither addressed by exception theorists nor by these critiques is why, after creating and justifying the narrowing of protections against torture, the liberal state had to withdraw the egregious memo on torture from the realm of the public discourse. In particular, I am referring to the need for the Bybee/Yoo memo to be withdrawn after the memo provided ways to narrow the protections against torture. In the new Levin memo, the section on necessity, self-defense and the Commander-in-Chief powers was dropped in entirety by the administration claiming that the "President's Commander-in-Chief power and potential defenses to liability (that) was - and remains - unnecessary."<sup>61</sup> The use of the term "unnecessary" is significant because it shows the belief among state officials that the President can authorize methods in violation of the Federal Torture Statute. However, the fact remains that the blatant aspects of the torture memo were withdrawn in the Levin memo.

The symbolic act of withdrawal cannot be explained either by the exception argument or by a critique of bad lawyering. I suggest that the withdrawal of the memo was necessary because, first, it created a direct link between the U.S. policy makers and the actors of violence and second, the memo explicitly provided a framework of authorizing acts that superseded the acceptable levels of violence in a liberal democracy.

In this context, contributions by Robert Cover, Austin Sarat, Timothy Kaufman-Osborn and others on the ambivalent relationship of law to violence becomes useful.<sup>62</sup> Apart from pointing to ways in which mainstream theorists such as Hart and Dworkin focus on law as primarily rules, norms and principles, leading to what Sarat and Kearns have famously termed a "forgetting of violence," these scholars illustrate how the liberal state tries to deny the role of violence

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in law despite its use.<sup>63</sup> According to Austin Sarat and Thomas Kearns, the dominant theory of legal violence suggests that "necessary" violence is primarily the action of agents who enforce the decisions made on the basis of abstract rules and principles. The emphasis of the mainstream legal theorists is on a bureaucratic structure of judicial decision-making rather than the concrete acts of legal interpretation by the judges. This, in turn, denies the important fact pointed out by Robert Cover that "**legal interpretation takes place in a field of pain and death**" and has physical implications.<sup>64</sup>

The example of death penalty illustrates how the judges distance themselves from the acts of violence. As Kaufman-Osborn explains, the violence is seen as being reflected only in the "deeds" of the executioner while carrying out the act of execution and not in the "words" of the judge proclaiming the execution, thereby, ignoring the integral relation between the two.<sup>65</sup> Thus, liberal states attempt to show violence as being marginal to law, rather than being integrally pervasive at all levels: legal interpretation and legal enforcement. In the post-9/11 context, the presence of the justificatory memos (that informed decisions) alongside the acts of torture in Abu Ghraib created a direct link between the interpreters of law (memo writers) and the acts of torture. Yet, the liberal state initially denied the presence of these acts of torture. When the pictures of torture confirmed the presence of these acts, the state started denying any authorization of these acts and when that failed, withdrew the explicit justificatory discourses. The symbolic significance of the act of withdrawal is that even at the height of the "war on terror" rhetoric, the Bush Administration could not defend torture as torture and when the leaked Bybee/Yoo memo appeared to be the genesis of the torture and abuse at Abu Ghraib (via Guantánamo), the memo had to be publicly withdrawn.

This is because the liberal state always attempts to portray its own violence as "humane" in opposition to "inhumane" non state violence. This is most visible in the change in the methods of execution in the United States from hanging to gas chamber, to electric chair and finally to lethal injection.<sup>66</sup> Each time the newer method was proclaimed as a less painful method of execution and lethal injection was considered as the most humane method. The withdrawal of the Bybee/Yoo memo, thus, has to be seen as the liberal state's attempt to ensure that the distinction between the humane "self" and the inhumane "other" is clearly maintained. By allowing for torturous methods, this major distinction between the controlled state and the brutal other would have been questioned. Here again the parallel between the methods of execution and methods of interrogation becomes important. In the case of developing humane methods of execution, as Austin Sarat notes, it is not due to the concern for the executed that the methods of execution change, rather it is to constantly ensure that the liberal state seems more humane than the other. The humane methods exist also to spare the witnesses from watching the pain and marks on the body of the condemned.<sup>67</sup> In fact, the recent debates on botched up executions by lethal injections indicate the inability of the state to do away with pain even in its most humane method of killing.<sup>68</sup> In the case of interrogations, it is the narrow definition of torture alongside the use of terms such as harsh or enhanced interrogation techniques in place of torture, on the one hand, and the emphasis on mental rather than physical methods of torture, on the other, that allowed the state to proclaim that it did not use torture. Thus, the withdrawal of the memo became necessary because the Bybee/Yoo memo alongside the Abu Ghraib pictures explicitly linked the state to unacceptable levels of violence that the denial strategies could not contain creating a crisis in the legitimacy of the liberal state.

When does violence become of a magnitude that it threatens the legitimacy of a state? Here the argument is not so much a particular identifiable or fixed threshold of violence that the state crosses but rather a combination of contingent circumstances that create the anxiety for the state. In the post-9/11 context, it was the leak of the photos, the emergence of the memos and documents, and the Bybee/Yoo memo clearly articulating the overstepping of some boundaries of unacceptable violence (always negotiated as the next section will illustrate) that required a withdrawal of this egregious document. The focus, therefore, is on the symbolic act of withdrawal that follows precisely because of a peculiar relationship that law has with violence in liberal states: the state cannot embrace its own violence when it is too explicit but still requires it and, hence, finds ways of reining in the violence to acceptable levels. The difficulties in doing so is illustrated in both the death penalty debates mentioned earlier, but also will be more specifically discussed in the last section of this paper: in liberal state's innovative and constantly negotiated attempts to accommodate excess violence through, for example, the creation of a juridico-medical apparatus.

The reason why the state needs to constantly negotiate the levels of permissible violence is because of its desire to accommodate excess violence to the extent possible. To put it another way, the reason why the torture debate is better explained by analyzing law's relationship to violence is because the Bybee/Yoo memo's definition of torture is not an entirely new creation. I argue that while Bybee/Yoo memo is significant to the extent that it narrowly reads the protections against torture, some of its arguments rely on torture debates in the pre-9/11 period making it difficult for the liberal state to completely do away with the problems in dealing with this form of excess violence.

**THE LANGUAGE OF 'EXCEPTION' IGNORES JURIDICAL STATE VIOLENCE—THE PROCEDURES AND PRACTICES AT PLACES LIKE BAGRAM WERE DIRECTLY EXPORTED FROM AMERICAN PRISONS.**

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More important, however, is the question of whether exception is necessary for the exercise of repressive force. Bull (2004: 5) observes that “it remains wholly unclear why . . . Agamben thinks extra-judicial state violence differs fundamentally from judicial state violence, on the one hand, and other forms of extrajudicial violence, on the other.” Why does the presence of state violence alone testify to a state of exception? Walter Benjamin, whose essay collection Agamben edited for the publisher Einaudi, would surely point out that there is tyranny enough under the law. Its suspension is hardly required for repressive acts to occur, hence the revelation, post-Abu Ghraib, that the famous torture techniques were imported, at least in part, from the American prison system. What seemed grotesque and exceptional was actually standard operating procedure, common practice, and de facto legal — all of which raises some profound concerns about the usefulness of this theory. Given the number of inmates on death row in Texas, why should the state of exception be relevant? Agamben might wish to believe that capital punishment marks the institutionalization of a state of exception, but that does not really make the case for its exceptionality one way or the other; in fact, Benjamin (1978: 286) argued that the violence of the death penalty was a guarantor of the originary force of the law, *sui generis*.

## **Link: Soft Power Advantage**

**TORTURE IS NOT FROWNED UPON FOR ITS MORAL IMPLICATIONS, RATHER FOR ITS POLITICAL IMPLICATIONS THAT COULD HARM US SUPREMACY**

**BOGGS, 2010**, PROFESSOR OF SOCIAL SCIENCES AT NATIONAL UNIVERSITY IN LOS ANGELES AND RECIPIENT OF THE CHARLES MCCOY CAREER ACHIEVEMENT AWARD FROM THE AMERICAN POLITICAL SCIENCE ASSOCIATION (CARL, *THE CRIMES OF EMPIRE: THE HISTORY AND POLITICS OF AN OUTLAW NATION*, PP.239-240)

General outrage in the U.S. at revelations of torture and other abuses at Guantanamo and Abu Ghraib have been mostly episodic and muted, following the established discourse that such

behavior is isolated and marginal, the product of a few renegade thugs. There is a pervasive mood in American society that "excesses" like torture might well be justified in fighting the war on terrorism. Not only law professors such as John Woo and Alan Dershowitz have argued as much, so too have editorials in leading newspapers like the Wall Street Journal. Taking a cue from Dershowitz, Mirko Bagaric and Julie Clark insist in their 2007 book *Torture* that such practices are not only permissible but obligatory where harsh treatment of "wrongdoers" might end up saving innocent lives. They argue: "Given the choice between inflicting a relatively small level of harm on a wrongdoer and saving an innocent person, it is verging on moral indecency to prefer the interests of the wrongdoer." They add: "It is indefensible to suggest that there should be any absolute ban on torture."<sup>76</sup> The atrocities explored in this chapter, however, go far beyond the limited examples that Bagaric and Clark have in mind, and the focus easily surpasses the question of information that might be gained by means of harsh and cruel "rendition." Further, the very social composition of "wrongdoers" in specific circumstances—for example, the U.S. in Iraq—will likely be just the reverse of what the authors glibly presume.

In the U.S., at least, both media and political culture have long been in a state of denial regarding the historical and systematic character of American outlaw behavior that has resurfaced in Iraq, Afghanistan, and Guantanamo. The issue of torture has never received anything resembling a full public airing much less thorough legal investigation within the framework of an independent tribunal. It has been more business-as-usual for an imperial power whose leaders (and supporters) believe they can set their own rules while engaging in criminal behavior with impunity—fitting the special claims of a great and noble superpower. The dominant belief appears to be that a nation embracing such enlightened goals as democracy, freedom, human rights, and peace ought to be granted broad latitude in its conduct of foreign and military policy, indeed that it should be exempt from precedents and norms routinely applied to other nations. Surveys reveal that more than half of all Americans are prepared to accept torture when it is used against designated enemies—that is, against those already demonized in the media as the "wrongdoers" mentioned above. That "humane treatment" ought to be extended to "terrorists" and kindred villains is frequently ridiculed in the media, especially in prevalently right-wing talk radio. Aside from lawyers and academics, other professionals have sometimes been complicit in an outlaw agenda—for example, psychologists assisting the military in refining its harsh interrogation techniques.<sup>77</sup> In the wake of the Abu Ghraib revelations, it is true, the media and politicians came forth to protest U.S. behavior, but their concerns revolved less around moral revulsion than fears the behavior would be counterproductive to American interests: it could hurt the U.S. "image" abroad and possibly lead to similar cruel treatment of U.S. captives.

In the end, while torture and related forms of violence might be counterproductive to some U.S. military agendas, they are best viewed as endemic to the far-reaching imperial operations of the permanent war economy and security state. As the pattern continues, however, the willful and often brazen use of torture reveals a wealth of insights into the modus operandi of an imperial power reluctant to concede limits to its geopolitical aims and international behavior. Integral to a sprawling Leviathan that stands outside all legality, such practices not only recall those of historical fascism but could signify revival of that ideology as the U.S. accelerates its pursuit of global supremacy.



## Torture Should Not Be Viewed as Exceptional

**TORTURE IS NOT EXCEPTIONAL—THE AFFIRMATIVE’S FOCUS ON SPECIFIC INSTANCES OF TORTURE AND THEIR ASSERTION THAT THIS VIOLENCE IS AN ABERRATION IN NEED OF CORRECTION ERASES THE STANDARD PRACTICES OF RAPE AND PRISONER ABUSE BY SENSATIONALIZING VIOLENCE AGAINST TERRORISTS**

**WHITMER**, TEACHES ETHNIC STUDIES AT THE UNIVERSITY OF COLORADO-Boulder, 2006 [BENJAMIN, “‘TORTURE CHAMBERS AND RAPE ROOMS’ WHAT ABU GHRAIB CAN TELL US ABOUT THE AMERICAN CARCERAL SYSTEM,” *CR: THE NEW CENTENNIAL REVIEW* 6.1 | PROJECT MUSE]

Prison is a second-by-second assault on the soul, a day-to-day degradation of the self, an oppressive steel and brick umbrella that transforms seconds into hours and hours into days” (Abu Jamal

1996, 53), writes one of America’s most famous political prisoners, An institutional superstructure of bureaucrats and psychologists proliferate to reinforce the normalizing power of the institution. As George Jackson writes: Prying, nosy, schizophrenic, domineering, psychoneurotic people press you from all sides. . . . I just cannot get used of the idea of some petty, stereotyped, bureaucratic official, patently suffering from some mental disorder, asking me questions, calling on me to explain myself. (1994, 117) Amateur psychobabble is not the only tool at the prison industry’s disposal. “Powerful, mind-bending drugs [are] prescribed to prisoners liberally, especially in light of a recent U.S. Supreme Court ruling that allows prison officials free rein to drug prisoners insensate” (Abu Jamal 1996, 19). The psychological techniques found at

Abu Ghraib are the norm in all American prisons, as is the use of psychiatrists and psychologists to break prisoners at Guantanamo Bay. According to The New England Journal of Medicine, “[h]ealth information has been routinely available to behavioral science consultants and others who are responsible for crafting and carrying out interrogation strategies. Through early 2003 (and possibly later), interrogators themselves had access to medical records. And since late 2002, psychiatrists and psychologists have been part of a strategy that employs extreme stress, combined with behavior-shaping rewards, to extract actionable intelligence from resistant captives. (Bloche and Marks 2005, 6) The outrage expressed at such tactics later in the article can only seem ridiculous given that trained psychologists and psychiatrists are used as a matter of course in American prisons. The only difference is that these tactics are used on prisoners at Guantanamo to garner information; they are used on U.S. prisoners solely to cripple them psychologically in the interest of making them more manageable. [End Page 183]

This leads us to a major fault in Foucault’s theory as applied to the United States. Even if we take his word that the project of European prisons is reformation, it is an absurdity to argue the same for the United States. Here, all pretenses of reformation—functioning prison libraries, higher education, job training—are stripped from the inmates as fast as politicians are able to disappropriate the funding. American philosopher Jeffrey Reiman poses the much more credible argument that the U.S. criminal justice system only makes sense if we understand it not as an apparatus to eliminate crime but “to project to the American public a visible image of the threat of crime as a threat from the poor” (Hames-Garcia 2004, 156). The American prison is not interested in reformation, but in demarcating social class to ensure that America’s underclasses understand their place and to provide concrete and steel models of social status and criminality. The American prison exists to construct the American social sphere, not vice versa. America is the American prison. American prisoners know this, especially

Black-American prisoners: From the point of view of the Afro-American experience, imprisonment is first of all the loss of a people’s freedom. The question of individual freedom, class freedom, and even of human freedom derive from that of social imprisonment. From this point of view, American society as a whole constitutes

the primary prison. (Franklin 1989a, 244) The examples are legion, from Alexander Berkman in the mid-nineteenth century, who dedicates his Prison Memoirs of an Anarchist to “all those who in and out of prison fight against their bondage” (Franklin 1989a, 147), to Ruben “Hurricane” Carter, who refers to the United States as a “penitentiary with a flag” (246). The most searing indictment, however, comes in “The Warden Said to Me the Other Day,” by criminally neglected prison poet Etheridge Knight: “The Warden said to me the other day (innocently, I think), ‘Say, etheridge, why come the black boys don’t run off like the white boys do?’ I lowered my jaw and scratched my head and said (innocently, I think), ‘Well, suh, I ain’t for sure, but I reckon it’s cause we ain’t got no where to run to.’” (Franklin 1989a, 246) Though Foucault’s model reinforces the social system through a network of enforced

normalization and rehabilitation, the American model is much more direct. There is “no where to run to,” not solely in the Foucaultian sense that the carceral replicates the institutionalized norms of the social system, but because the U.S. justice system is designed to serve as a direct barrier to social change. With its guard towers and concertina wire as the purest symbols of the judicial system’s arbitrary power, the American carceral erases political activists, smothers the civilian population with a blanket of terror, and removes such proportions of oppositional populations as to make a broad-based political movement nearly impossible. After all, for every civilian who disappears, there is an entire community suddenly overwhelmed with his or her responsibilities. Furthermore, a vast amount of time and resources must suddenly be devoted to legal maneuvers. The gaps created by the disappearance of a single member of a community cannot be overestimated. When those disappearances run to a third of the population or more, the results cannot be less than devastating. “There is no where to run to,” in other words, because for many, the carceral is so intertwined with their communities, they might as well try to outrun cancer. In the same way, Foucault’s contention that the modern prison system no longer relies on physical violence fails

spectacularly when applied to the United States. The singular brutality of American prison literature cannot help but prove that bodily violence is a central disciplinary technique of the penal system, whether that violence is carried out by guards or by prisoners, whose frustration at their situation expresses

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itself in the form of violence toward other prisoners. Similarly, the fact that physical violence is not explicitly [End Page 185] called for in a prisoner's sentence does not mean that it is not a known consequence of incarceration. (Hames-Garcia 2004, 148) No prisoner is unaware of the common brutality endemic to American prisons and that it is meant to become inseparable from his or her day-to-day existence, meant to be understood as part of his or her punishment. As Leonard Peltier writes, "[you] never let your guard down when you live in hell. Every one of those sounds—or one of those silences—could well be my last, I know" (Peltier 1999, 3). Prison-sanctioned rape, for instance, is committed by both guards and inmates. The most conservative estimates indicate that more than one million prisoners have been raped in the last 20 years (Prison Rape Elimination Act of 2003).<sup>4</sup> An epidemic of vicious sexual aberration runs through American culture that no one understands better than the prisoner: The sexual problems characteristic of each stage of our history have been analyzed most keenly in literature by Afro-American "criminals." There is an unbroken line of development from Incidents in the Life of a Slave Girl by Linda Brent, whose crime was refusing to submit to the perverted sexuality of her master, through that turn-of-the-century Georgia peon whose wife was taken away to service the sexual needs of his masters, through Malcolm X, who worked as a pimp in Harlem, guiding wealthy old white men to oggle and participate in their most diseased sado-masochistic fantasies with Black women and men, to Eldridge Cleaver's own sexual aberrations, which led, in *Soul On Ice*, to his incisive exploration of the psychopathology inherent in the stereotyped sexual roles imposed by American culture on the Black man, the white woman, the white man, and the Black woman. (Franklin 1989a, 249)

Nothing is quite as indicative of this psychopathology as America's obsession with prison rape. Popular culture is replete with examples, from the awesomely homoerotic Sylvester Stallone vehicle *Lock Up* to the HBO series *Oz*, which often degenerates into little more than soft-core rape pornography. [End Page 186] Likewise, the sexual tortures coming out of Abu Ghraib provide an unparalleled peek into American sexual psychopathology. Even noting that the worst of the pictures and accounts have yet to be released to the American public, the level of perversity is impressive. Prisoners anally raped with chemical lights and broomsticks; a boy brutally sodomized by a man in uniform as a female soldier takes photographs; women raped repeatedly by military police; a 70-year-old Iraqi woman, harnessed and ridden around the prison while the soldiers cheered and called her a donkey; and the image that has come to signify the United States for much of the Middle East (and quite rightly): a young soldier with a fresh face, smoking a cigarette and giving a thumbs up while a naked captive with a bag on his head is forced to masturbate for her amusement. Abu Ghraib contains the complete theater of sexual aberration that Eldridge Cleaver outlines, with every form of racial-sexual humiliation and violation endemic to the United States, all being enacted by our uniformed men and women. As Cleaver wrote from prison nearly 40 years ago, it is no series of aberrations; it is the bedrock of the American social system (Cleaver 1991). Nowhere is this more evident than in the form by which we learned of these abuses. As unembedded journalist David Enders notes, "We knew about the Abu Ghraib torture eight months before it hit major American media sources. We'd collected widely corroborated testimony from all parts of the country, we'd seen evidence of torture, we'd seen evidence of electrocution, we'd seen evidence of beatings, we heard the stories of people forced to stand naked, rape each other, all this bullshit. And it didn't make headlines until there was actual porn to go with it. (Enders 2004, 2) Once they had taken the form of pornography, the abuses became palatable, and even titillating, for the American public. There is a beautiful symmetry to the fact that the same cable news networks that had yet to show a single American corpse in Iraq delighted in running photographs of nude, feces-smear Arab in 24-hour cycles, all the while instructing commentators to decontextualize them as quickly as possible. Hysterical pundits shrilly ensured us that what we were seeing was the action of only a few bad [End Page 187] apples. Some even went so far as to debate whether such actions could really be called torture. All the while, identical scenarios of sexual humiliation and rape were played out hourly in U.S. prisons. As one inmate writes, "sexual assaults are so pervasive in correctional facilities today that they have become unspoken, de facto parts of court-imposed punishments" (Hassine 1999, 134). Far from trying to curb the epidemic of sexual torture in American prisons, administrators and staff members seem to view it as "part of the punishment-risk that lawbreakers take when they commit their crimes," or worse, "an effective management tool" (136). Furthermore, the American citizenry does not seem overly concerned. Like prison officials, most seem to consider rape a natural concomitant of prison life and are consumed with double-entendres and knowing chuckles whenever the subject arises. Next to this behavior, the infrequent and much hyped Taliban-sanctioned public stonings seem almost innocuous. Like Abu Ghraib, American prisons provide no rehabilitation. Like Abu Ghraib, American prisons provide no attempt to rehabilitate prisoners. Like Abu Ghraib, American prisons exist to deform, to dehumanize, and to ruin the prisoner, body and soul. Moreover, they have never existed for any other reason. In the words of one nineteenth-century American prison writer who pines for a single act of maiming over the protracted molestation found in American incarceration: The alteration of methods has changed, but in no degree mitigated, the punishment inflicted on the criminal; for who would not prefer the loss of an ear, or such a matter, to even so much as one year of confinement in a stone sepulcher to be guarded, watched, tortured in body and soul, and lashed by the gaze of the curious. (Sullivan 2003, 179) The only rehabilitation the prisoner finds is that he will be cowed in the face of power. As Jack London puts it: "I saw with my own eyes, there in that prison, things unbelievable and monstrous. . . . My indignation ebbed away, and into my being rushed the [End Page 188] tides of fear. I saw at last, clear-eyed, what I was up against. I grew meek and lowly. Each day I resolved more emphatically to make no rumpus when I got out. All I asked, when I got out, was a chance to fade away from the landscape. (Franklin 1989b, 49) Because this dehumanization is meant to be complete, there are no methods that will not be undertaken to ensure it. As H. Bruce Franklin writes, "our penal institutions force each prisoner to become either a broken, cringing animal, fawning before all authority and power, or a rebel, clinging to human dignity through defiance and violence" (Franklin 1989b, 189)

**THE PRACTICES OF TORTURE IS NO DIFFERENT THAN DAILY LIFE IN AMERICAN PRISONS.**

**DAVIS**, RETIRED PROFESSOR AT THE HISTORY OF CONSCIOUSNESS DEPARTMENT AT THE UNIVERSITY OF CALIFORNIA-SANTA CRUZ, **2005** [ANGELA, ABOLITION DEMOCRACY: BEYOND EMPIRES, PRISONS, AND TORTURE, PP. 62-69]

We tend to think about torture as an aberrant event. Torture is extraordinary and can be clearly distinguished from other regimes of punishment. But if we consider the various forms of violence linked to the practice of imprisonment—circuits of violence linked to one another—then we begin to see that the extraordinary has some connection to the ordinary. Within the radical movement in defense of women prisoners' rights, the routine

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strip and cavity search is recognized as a form of sexual assault. As activists like Debbie Kilroy of Sisters Inside have pointed out, if uniforms are replaced with civilian clothes—the guard’s and the prisoner’s—then the act of strip searching would look exactly like the sexual violence that is experienced by the prisoner who is ordered to remove her clothing, stoop, and spread her buttocks. In the case of vaginal and rectal searches, routinely performed on women prisoners in the U.S., this continuum of sexual violence is even more obvious.

To break free of this blackmail, as you put it, to move beyond the permissible terms, it might be helpful to consider the connections between everyday prison violence and torture. Of course, we know that some of the military personnel involved in the Abu Ghraib scandal had previously served as prison guards in domestic prisons. This points to a deeper connection between the situation at Abu Ghraib and domestic imprisonment practices. It is not a coincidence that Charles Garner, recently tried and convicted for his role in the tortures, had been employed as prison guard at SCI-Greene, the facility where death row prisoners—including Mumia Abu Jamal—are housed in Pennsylvania. As a matter of fact there were at least two lawsuits filed against him for abuse within that prison. Of course I don’t want to suggest that Garner’s previous history as a prison guard is a sufficient explanation for the tortures at Abu Ghraib, especially if such an argument is used to absolve the military hierarchy and the Bush government of responsibility. Rather I am attempting to highlight the links between the institution of the military prison and that of the domestic prison. What is routinely accepted as necessary conduct by prison guards can easily turn into the kind of torture that violates international standards, especially under the impact of racism. Fanon once made the point that violence is always there on the horizon of racism. Rather than rely on a taxonomy of those acts that are defined as torture and those that are not, it may be more revealing to examine how one set of institutionalized practices actually enables the other.

**[CONTINUES SIX PAGES LATER]**

The prison-industrial-complex embraces a vast set of institutions from the obvious ones, such as the prisons and the various places of incarceration such as jails, “jails in Indian country,” immigrant detention centers, and military prisons to corporations that profit from prison labor or from the sale of products that enable imprisonment, media, other government agencies, etc. Ideologies play a central role in consolidating the prison-industrial-complex—for example the marketing of the idea that prisons are necessary to democracy and that they are a major component of the solution of social problems.

Throughout the world, racism has become embedded in imprisonment practices: whether in the U.S., Australia, or Europe, you will discover a disproportionate number of people of color and people from the Global South incarcerated in jails and prisons. The everyday tortures experienced by the inhabitants of domestic prisons in the U.S. have enabled the justification of the treatment meted out to prisoners in Abu Ghraib and Guantánamo. As I said earlier, it was hardly accidental that a U.S. prison guard like Charles Garner was recruited to work in Abu Ghraib. He was already familiar with the many ways prison objectifies and dehumanizes its inhabitants.

## **Imperialism Impact**

**AFF REPLICATES DISCOURSE OF MILITARY OFFICIALS WHO TREAT TERRORISM AS AN EXCEPTION TO THE RULE—CHALLENGING TORTURE IS MERELY A SYMPTOM OF A STRUCTURE OF U.S. IMPERIALISM**  
**BOGGS, 2010**, PROFESSOR OF SOCIAL SCIENCES AT NATIONAL UNIVERSITY IN LOS ANGELES AND RECIPIENT OF THE CHARLES MCCOY CAREER ACHIEVEMENT AWARD FROM THE AMERICAN POLITICAL SCIENCE ASSOCIATION (CARL, *THE CRIMES OF EMPIRE: THE HISTORY AND POLITICS OF AN OUTLAW NATION*, PP.207-208)

In the midst of embarrassing images of prisoner mistreatment and frenzied promises of change, however, government and military leaders were quick to affirm two comforting discourses—that the abuses were the product of a few wayward (and notably low-level) soldiers and were a radical departure from revered U.S. traditions and values. General Wesley Clark, former NATO commander and 2004 presidential candidate, gave a speech at UCLA in October 2006 in which he denounced torture and related practices, saying they go against the grain of American dedication to international rules and laws. "Law is sacred to the American system," pronounced Clark. "A retreat from Geneva means nothing less than abandoning American values." In the aftermath of the Abu Ghraib revelations and publicity, President Bush said that prisoner abuse was a revolting exception to the norm, for "that's not the way we do things in America." Acknowledging the misguided actions of a few, Secretary of Defense Rumsfeld said in late 2004 that all detainees in U.S. custody are treated "humanely," consistent with the provisions of international law. A lengthier response came from Secretary of State Condoleezza Rice who, speaking in December 2005, stated: "With respect to detainees the United States government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States government does not authorize or condone torture of detainees. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world." She described the atrocities at Guantanamo and Abu Ghraib (among others) as sickening aberrations from the norm, not likely to be repeated.<sup>2</sup>

References to U.S. obligations to the "rule of law" and international norms are, as we have seen, constantly invoked but rarely transcend ideological rituals detached from actual historical experience. Much the same can be said of the supposed power of American traditions and values.

Viewed in the larger historical context, Bush-era human rights violations and other criminal abuses represent no deviation from earlier U.S. practices but rather their extension within a new paradigm of warfare. The act of torture itself can be viewed as part of the American legacy of imperialism and militarism, in many ways integral to the logic of geopolitical ambitions. A nation that has so often carried out military aggression, wantonly attacked civilian populations and targets, destroyed entire societies, used weapons of mass destruction, and deployed its armed might to crush oppositional movements around the world—killing millions and displacing tens of millions more in the process—cannot, be expected to shy away from torture and similar atrocities as routinely goes about its global business. Illegal detentions, denial of due process, kidnappings, assassinations, death-squad murders, and cruel interrogation methods are simply another expression of imperial power. (Whether the atrocities in question are carried out directly or through proxies is of secondary importance.) Viewed in this context, torture and kindred abuses must be understood as an outgrowth of U S militarism over time, sanctioned at the very top of the power structure (though usually not overtly). The ethos of death and destruction that inevitably accompanies U.S. efforts to achieve imperial aims has a long trajectory, first appearing well before international legal canons governing human rights were set in motion.

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**\*War on Terrorism Good\***

## Threat Real

### **TERROR THREATS INCREASING**

Ashton B. Carter, chair of the International and Global Affairs faculty at Harvard Kennedy School. Orbis, Winter 2009, p. 47

No one can say how long it will take to defeat or contain radical Islamist extremists bent on terrorism. However, there are reasons to believe that combating terrorism will be an enduring feature of the national security landscape long after what the Bush administration calls the “Long War” against Islamist extremism is over. With the advance of technology, the destructive power available to even small groups of extremists is growing. At the same time, society is growing more interdependent and connected and thus more vulnerable to terror—physically and psychologically. These two fundamental trends are visible as far into the future as any of us can see. Whatever the lifetime of Islamist extremism, therefore, it will long remain the business of national security authorities to counter terrorism arising from other movements and groups. In this sense, the notion of a “Long War on Terror” is apt.

### **GLOBALIZATION INCREASES THE RISK OF NUCLEAR TERRORISM**

Commission on the Prevention of WMD Proliferation and Terrorism, December 2008,

<http://documents.scribd.com/docs/15bq1nrl9aerfu0yu9qd.pdf>

The United States still wields enormous power of the traditional kind, but traditional power is less effective than it used to be. In today’s world, individuals anywhere on the planet connect instantly with one another and with information. Money is moved, transactions are made, information is shared, instructions are issued, and attacks are unleashed with a keystroke. Weapons of tremendous destructive capability can be developed or acquired by those without access to an industrial base or even an economic base of any kind, and those weapons can be used to kill thousands of people and disrupt vital financial, communications, and transportation systems, which are easy to attack and hard to defend. All these factors have made nation-states less powerful and more vulnerable relative to the terrorists, who have no national base to defend and who therefore cannot be deterred through traditional means.

### **THE THREAT IS REAL—WE MUST FEAR TERRORISTS**

**KRAUTHAMMER**, PULITZER PRIZE-WINNING SYNDICATED COLUMNIST AND COMMENTATOR, 2004

[CHARLES, “THE CASE FOR FEARMONGERING,” TIME MAGAZINE, OCTOBER 12,

[HTTP://WWW.TIME.COM/TIME/COLUMNIST/KRAUTHAMMER/ARTICLE/0,9565,714066,00.HTML](http://www.time.com/time/columnist/krauthammer/article/0,9565,714066,00.html)]

Such piety is always ridiculous but never more ridiculous than today. Never in American history has fear been a more appropriate feeling. Never has addressing that fear been a more relevant issue in a political campaign. Shortly after Hiroshima, wrote physicist Richard Feynman in his memoirs, “I would go along and I would see people building a bridge ... and I thought, they’re crazy, they just don’t understand, they don’t understand. Why are they making new things? It’s so useless.” Useless because doomed. Futile because humanity had no future. That’s what happens to a man who worked on the Manhattan Project and saw with his own eyes at Alamogordo intimations of the apocalypse. Feynman had firsthand knowledge of what man had wrought — and a first-class mind deeply skeptical of the ability of his own primitive species not to be undone by its own cleverness. Feynman was not alone. The late 1940s and ’50s were so pervaded by a general fear of nuclear annihilation that the era was known as the Age of Anxiety. That anxiety dissipated over the decades as we convinced ourselves that deterrence (the threat of mutual annihilation) would assure our safety. Sept. 11 ripped away that illusion. Deterrence depends on rationality. But the new enemy is the embodiment of irrationality: nihilists with a cult of death, yearning for the apocalypse — armed, ready and appallingly able. The primordial fear that haunted us through the first days and weeks after 9/11 has dissipated. Not because the threat has disappeared but for the simple reason that in our ordinary lives we simply cannot sustain that level of anxiety. The threat is as real as it was on Sept. 12. It only feels distant because it is psychologically impossible to constantly face the truth and yet carry on day to day. But as it is the first duty of government to provide for the common defense, it is the first duty of any post-9/11 government to face that truth every day and to raise it to national consciousness at least once every four years, when the nation chooses its leaders. Fearmongering? Yes. And very salutary. When you live in an age of terrorism with increasingly available weapons of mass destruction, it is the absence of fear that is utterly irrational. The ’90s are over. It’s not the economy, stupid. It’s Hiroshima — on American soil. If that doesn’t scare you, it should. We could use more fear in this election, not less. Cheney should be commended for his candor. Kennedy too.

### **FAILURE TO PREVENT TERRORIST ATTACK THREATENS GLOBAL SURVIVAL**

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Jan C. Ting, **Professor of Law, Temple University, 2002**, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1145

But, despite the appearance of normality, we remain fully engaged in a life-and-death struggle with international terrorism. No one can doubt after the September 11 attacks, the willingness of these terrorists to use nuclear, biological, and chemical weapons against us if, and as soon as, they can get their hands on them. And recent disclosures from Afghanistan make clear the determination of terrorists to develop weapons of mass destruction. n1 Against a foe not just willing to die, but anxious to die a glorious death in a holy war, we must be victorious. For without victory against such a foe, there will be no survival.

#### **TERRORISM REMAINS A REAL NATIONAL AND INTERNATIONAL SECURITY THREAT**

Paul Rosenzweig, **Senior Legal Research Fellow, Heritage Foundation, 2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 677-8

The full extent of the terrorist threat to America cannot be fully known. n49 Consider, as an example, one domestic aspect of that threat--an effort to determine precisely how many al-Qaeda operatives are in the United States at this time and to identify those who may enter in the future.

Terrorism remains a potent threat to international security. The U.S. State Department has a list of over 100,000 names worldwide of suspected terrorists or people with contact to terrorists. n50 Before their camps in Afghanistan were shut down, Al Qaeda trained at least 70,000 people and possibly tens of thousands more. n51 Al Qaeda linked Jemaah Islamiyah in Indonesia is estimated to have 3,000 members across Southeast Asia and is still growing larger. n52 Although the estimates of the number of al-Qaeda terrorists in the United States have varied since the initial attack on September 11, the figure provided by the government in recent, supposedly confidential, briefings to policymakers is 5,000. n53 This 5,000-person estimate may include many who are engaged in fundraising for terrorist organizations and others who were trained in some fashion to engage in jihad, whether or not they are actively engaged in a terrorist cell at this time. But these [\*678] and other publicly available statistics support two conclusions: (1) no one can say with much certainty how many terrorists are living in the United States; and (2) many who want to enter in the foreseeable future will be able to do so.

#### **9/11 ATTACKS SIGNAL REAL POSSIBILITY OF WMD TERRORISM**

Jeffrey F. Addicott, **Assistant Professor of Law, St Mary's University School of Law, 2002**, The Scholar: St.Mary's Law Review on Minority Issues, 4 SCHOLAR 209, p. 229-30

Second, the world must wake out of its millenary sleep and recognize the real possibility that weapons of mass destruction will be used against large civilian population centers. Clearly, the terror attacks of September 11, 2001, have demonstrated that international terrorism has now "brought us across the threshold" of creating mass casualties. The al-Qa'eda-styled terrorist is not content to kill in the tens or twenties; he aggressively seeks access to weapons of mass destruction in order to murder in the thousands and tens of thousands. While nuclear weapons may be beyond the reach of international terrorists at this time, n127 biological and chemical weapons are not. Biological and chemical agents are inexpensive, easy to obtain, hard to trace and capable of killing thousands.

Add into the equation the fact that al-Qa'eda terrorists have evidenced a clear desire to use weapons of mass destruction, n128 and a doomsday scenario becomes a central consideration of whether or not the War on Terror should be expanded. n129 Even one or two dedicated suicide bombers armed with a chemical, biological, or nuclear weapon could inflict catastrophic death and destruction in an urban environment.

## **Torture is a Moral Response to Terrorism**

**TERRORISM IS FUNDAMENTALLY EVIL, WHICH MEANS WE MUST BE WILLING TO GET OUR HANDS DIRTY WITH EFFECTIVE METHODS LIKE TORTURE IN ORDER TO DEFEAT IT**

**GOLDMAN**, ASSOCIATE EDITOR OF FIRST THINGS, **2009** [DAVID, “THE TORTURE DEBATE SHOWS OUR VULNERABILITY TO RADICAL EVIL”, THE INSTITUTE ON RELIGION AND PUBLIC LIFE, MAY 12TH, [HTTP://WWW.FIRSTTHINGS.COM/ONTHE SQUARE/2009/05/THE-TORTURE-DEBATE-SHOWS-OUR-V](http://www.firstthings.com/onthesquare/2009/05/the-torture-debate-shows-our-v)]

Radical evil sets the threshold of victory so high that we risk contamination by confronting it on its own terms. Terrorists tempt us to torture them, by striking against innocent noncombatants out of the shadows. The present debate over torture is a black cloud as big as a man's hand announcing a storm to come. How do we arrogate unto ourselves the right to inflict death and extreme pain upon innocents—leave aside not-so-innocent terrorists—without corrupting ourselves? The insidious character of radical evil seeks to contaminate us through our own response.

Ordinary evil kills for profit or rapes for pleasure. Radical evil rapes and kills so that terror and horror will blot out the memory of the good and leave behind only the capacity for more evil.

Radical evil seeks to destroy the good out of envy; if we cannot envision the Good, we must stand dumb and uncomprehending before radical evil. And no secular philosophy can explain the Good; no mainstream current of modern philosophy even tries. All the less can secular philosophy explain radical evil. The erosion of the West's theological understanding of good and evil since the Second World War and the Cold War leaves us vulnerable to radical evil. It is in this context that the present debate over torture should be situated.

To confront radical evil on its own terms—and that cannot always be avoided—carries the risk of contagion. Terrorists who kill large numbers of noncombatants in order to tear apart the social fabric through “terror and horror” (Schrecken und Entsetzen, as Goebbels liked to cite Luther) embody such evil. They dare us to respond in kind, for example, by attacking the civilian populations that host terrorists, in which they lurk and by employing “enhanced interrogation,” or torture, on a large scale in operations against them. Their strategic objective is to make the conduct of war too horrible for the West to endure. On past occasions, including the Algerian War and the Vietnam War, they succeeded.

We should remember that to defeat radical evil during the Second World War, we bombed civilian districts of large cities, causing not only millions of death but also dreadful physical suffering upon noncombatants compared to which waterboarding seems trivial. Anyone who doubts this should read the eyewitness accounts from Hiroshima. Nothing is more painful than death by burning, and many of the victims did not die quickly. Ivan Karamazov accused God for making children suffer; by what right do we make children suffer? Nuclear bombardment of Japanese cities was justified by military logic, as the alternative was an invasion that would have cost many times more civilian lives, as well as the lives of hundreds of thousands of soldiers. The same argument applies to the non-nuclear but equally destructive bombardment of German cities. Nonetheless the suffering involved was beyond the frontier of horror.

Horrible methods of war were morally justified because the Axis powers practiced an extreme of evil not previously observed in human history. Not only did the Nazis murder, but they deliberately made as many Germans as possible complicit in these murders. Surveying recent histories of Germany during the Second World War, the Atlantic's literary editor Benjamin Schwarz notes that “although knowledge of the Final Solution prompted action by only a heroic few, that knowledge—and Germans’ accompanying quiescence—nevertheless loomed large in the mind, and in many cases the soul, of the nation. This was deliberate on the part of the regime . . . By establishing the murder of the Jews as an open secret—open enough that awareness of it pervaded society but secret enough that it couldn't be protested or even openly discussed—the Nazis devilishly nudged the nation into complicity, and further bound the population to its leaders.”

The Nazi regime set out to destroy God's people, the Jews, and bragged about it in order to imprint evil upon Germany's consciousness. “By 1943 at the latest . . . the war was lost for Germany. Yet for nearly two more years the Germans would continue the struggle,” Schwarz observes. He quotes a grim Goebbels broadcast of 1943: “As for us, we've burned our bridges behind us . . . We will either go down in history as the greatest statesmen of all time, or the greatest criminals.”

There was nothing mediocre about it. If Germany lost the war, the Nazi leadership envisioned a downfall so horrible that its memory would poison civilization forever. This is as close to radical evil as humankind has come.

Radical evil has no object but to destroy the good, that is, to propagate evil for its own sake. At every cost, this evil had to be defeated.

During the Cold War, for that matter, the United States twice went to the brink of nuclear war, first by blockading Cuba during the 1962 missile crisis, and second by installing the medium-range Pershing Missiles in Germany in 1982, a sort of Cuban missile crisis in reverse. The Soviet Union seriously considered war as an alternative to accepting an irreversible strategic setback on the central front, as CIA analyst Benjamin Fischer reports in an unclassified monograph. To defeat Communism, the United States risked horrors beyond anything the world yet has seen—and by doing so freed the world from a great evil.

In the Second World War and the Cold War war, Americans could endure the actual or prospective horrors of war because they understood in theological terms that they were at war with radical evil. America presented its war aims in terms of a civil religion generally Christian in outlook, but that also sanctified democratic institutions. This civic religion persisted



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into the Cold War as an instrument of American strategic aims. Americans saw the Second World War as a contest of good against evil, and thus were inoculated against the effect of Schrecken und Entsetzen. Goebbels' Wagnerian theater of cruelty did not bring down the West along with Germany, because America, at least, understood its war policy as a Christian response to radical evil.

Secular society, by contrast, has an inherent vulnerability to radical evil, which it has no means to understand. Secular philosophy cannot produce an ethics; much less can it account for radical evil. Marx's economic man may pillage and Freud's libidinous man may rape, but they do so for the sake of loot and pleasure. Evil that destroys for the sake of destruction, out of envy of the Good, lies outside the horizon of secular thought. Secular thinkers stand dumb and uncomprehending before Mephistopheles, who told Faust, "I am the spirit that always negates, and rightly so, because everything that comes to be is worthy of its own destruction . . . I am a part of that part which in the beginning was everything/A part of darkness that gave birth to light; the proud light/that now contests Mother Night's old rank and space." It is instructive to consider what happens when a Christian country fights radical evil on ground chosen by evil, in the absence of popular understanding of what the enemy represents. That was the case during the Vietnam War, when many Americans refused to believe that Vietnamese Communism embodied radical evil. Ubiquitous images of civilian casualties horrified Americans, especially young people who had no memory of the Second World War. A large minority of Americans came to believe that America, rather than Communist aggression, was the source of evil. Schrecken und entsetzen fueled a peace movement that undermined the American civic religion that had served so well during the Second World War and the early phases of the Cold War. The trouble was not that America lost the war—on the contrary, America won the war on the ground—but that the methods required to win against radical evil (bombing that caused extensive civilian death, assassinations of Communist cadre) horrified Americans.

The professional consensus as well as the historical record shows that torture works quite well against terrorist cells. "Enhanced interrogation" helped suppress attacks on American forces in Iraq. It also destroyed the FLN in Algeria.

The French army's ruthless methods (torture, use of counter-terror auxiliaries, aerial bombardment of pro-rebel villages, forced concentration of rural populations) had suppressed the rebellion by 1959, but popular support for the war had collapsed. As in Vietnam, the FLN terrorists lost the war on the ground, but by forcing France to engage on their terms, succeeded in demoralizing the French people.

America was vulnerable to terror and horror during the Vietnam War, when its government failed to persuade the public that its adversary embodied an evil so great as to justify the use of terrible countermeasures. America is even more vulnerable today, when its government cannot even identify who and what the enemy might be. President Obama insists that America is not at war with Islam, but it surely is at war with an interpretation of Islam shared by tens and possibly hundreds of millions of people. By falsely representing the terrorists as an unrepresentative minority in the Muslim world, Western governments have left their people vulnerable to a profoundly demoralizing shock.

Consider this scenario: Suppose that a terrorist organization were to obtain a nuclear weapon from Pakistan or Iran, and used such a weapon to inflict a few hundred thousand casualties on an American city. America well might retaliate by bombarding the guilty country with nuclear weapons, causing millions of casualties. I do not believe the Islamists would hesitate for a moment to sacrifice ten or twenty million Muslims, that is, three to six percent of the world Muslim population, if it increased the likelihood of victory over the West. The horror that such an exchange would provoke might have devastating effects on Western morale and overwhelm the West with horror. The result could be Vietnam writ huge.

## **Military Key to War on Terror**

**TERRORISM IS AN IDEOLOGY DIRECTLY OPPOSED TO AMERICAN FREEDOM – THE ONLY WAY TO APPROACH IT IS THROUGH MILITARY SOLUTIONS**

**EPSTEIN**, FELLOW AT THE AYN RAND INSTITUTE, **2005** [ALEX, “FIGHT THE ROOT OF TERRORISM WITH BOMBS, NOT BREAD”, AUG 14TH,

[HTTP://WWW.AYNRAND.ORG/SITE/NEWS2?PAGE=NEWSARTICLE&ID=11243&NEWS\\_IV\\_CTRL=1021](http://www.aynrand.org/site/News2?PAGE=NEWSARTICLE&ID=11243&NEWS_IV_CTRL=1021)]

Eliminating the root of terrorism is indeed a valid goal--but properly targeted military action, not welfare handouts, is the means of doing so.

Terrorism is not caused by poverty. The terrorists of September 11 did not attack America in order to make the Middle East richer. To the contrary, their stated goal was to repel any penetration of the prosperous culture of the industrialized "infidels" into their world. The wealthy Osama bin Laden was not using his millions to build electric power plants or irrigation canals. If he and his terrorist minions wanted prosperity, they would seek to emulate the United States--not to destroy it.

More fundamental, poverty as such cannot determine anyone's code of morality. It is the ideas that individuals choose to adopt which make them pursue certain goals and values. A desire to destroy wealth and to slaughter innocent, productive human beings cannot be explained by a lack of money or a poor quality of life--only by anti-wealth, anti-life ideas. These terrorists are motivated by the ideology of Islamic Fundamentalism. This other-worldly, authoritarian doctrine views America's freedom, prosperity, and pursuit of worldly pleasures as the height of depravity. Its adherents resent America's success, along with the appeal its culture has to many Middle Eastern youths. To the fundamentalists, Americans are "infidels" who should be killed. As a former Taliban official said, "The Americans are fighting so they can live and enjoy the material things in life. But we are fighting so we can die in the cause of God."

The terrorists hate us because of their ideology--a fact that filling up the coffers of Third World governments will do nothing to change. What then, can our government do? It cannot directly eradicate the deepest, philosophical roots of terrorism; but by using military force, it can eliminate the only "root cause" relevant in a political context: state sponsorship of terrorism. The fundamentalists' hostility toward America can translate into international terrorism only via the governments that employ, finance, train, and provide refuge to terrorist networks. Such assistance is the cause of the terrorist threat--and America has the military might to remove that cause.

It is precisely in the name of fighting terrorism at its root that America must extend its fist, not its hand. Whatever other areas of the world may require U.S. troops to stop terrorist operations, we must above all go after the single main source of the threat--Iran. This theocratic nation is both the birthplace of the Islamic Fundamentalist revolution and, as a consequence, a leading sponsor of terrorism. Removing that government from power would be a potent blow against Islamic terrorism. It would destroy the political embodiment of the terrorists' cause. It would declare America's intolerance of support for terrorists. It would be an unequivocal lesson, showing what will happen to other countries if they fail to crack down on terrorists within their borders. And it would acknowledge the fact that dropping bombs, not food packages, is the only way for our government to attack terrorism at its root.

### **A VIOLENT WAR ON TERRORISM PREDICTATED ON TARGETING KILLING IS NECESSARY TO WIN THE WAR**

**Hanson 2010** (Victor, Senior Fellow, Hoover. Former visiting prof, classics, Stanford. PhD in classics, Stanford, The Tragic Truth of War, 19 February 2010,

<http://www.victorhanson.com/articles/hanson021910.html>)

**Victory has usually been defined throughout the ages as forcing the enemy to accept certain political objectives.** "Forcing" usually meant killing, capturing, or wounding men at arms. **In today's polite and politically correct society we seem to have forgotten that nasty but eternal truth in the confusing struggle to**

**defeat radical Islamic terrorism.** What stopped the imperial German army from absorbing France in World War I and eventually made the Kaiser abdicate was the destruction of a once magnificent army on the Western front — superb soldiers and expertise that could not easily be replaced. **Saddam Hussein left** Kuwait in 1991 **when he realized that the U.S.**

**military was destroying his very army. Even the North Vietnamese agreed to a peace settlement in 1973,** given their past horrific losses on the ground and the promise that American air power could continue

**indefinitely inflicting its damage on the North. When an enemy finally gives up, it is for a combination of reasons — material losses, economic hardship, loss of territory, erosion of civilian morale, fright, mental**

**exhaustion, internal strife.** But we forget that central to a concession of defeat is often the loss of the nation's soldiers — or even the threat of such deaths. A central theme in most of the memoirs of high-ranking officers of the Third Reich is the attrition of their best warriors. In other words, among all the multifarious reasons why Nazi Germany was defeated, perhaps the key was that hundreds of thousands of its best aviators, U-boaters, panzers, infantrymen, and officers, who swept to victory throughout 1939–41, simply perished in the fighting and were no longer around to stop the allies from doing pretty much what they wanted by 1944–45. After Stalingrad and Kursk, there were not enough good German soldiers to stop the Red Army.

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Even the introduction of jets could not save Hitler in 1945 — given that British and American airmen had killed thousands of Luftwaffe pilots between 1939 and 1943. After the near destruction of the Grand Army in Russia in 1812, even Napoleon's genius could not restore his European empire. Serial and massive Communist offensives between November 1950 and April 1951 in Korea cost Red China hundreds of thousands of its crack infantry — and ensured that, for all its aggressive talk, it would never retake Seoul in 1952–53. **But aren't these cherry-picked examples from conventional wars of the past that have no relevance to the present age of limited conflict, terrorism, and insurgency where ideology reigns? Not really.** We don't quite know all the factors that contributed to the amazing success of the American "surge" in Iraq in 2007–08. Surely a number of considerations played a part: Iraqi anger at the brutish nature of al-Qaeda terrorists in their midst; increased oil prices that brought massive new revenues into the country; General Petraeus's inspired counterinsurgency tactics that helped win over Iraqis to our side by providing them with jobs and security; much-improved American equipment; and the addition of 30,000 more American troops. But what is unspoken is also the sheer cumulative number of al Qaeda and other Islamic terrorists that the U.S. military killed or wounded between 2003 and 2008 in firefights from Fallujah to Basra.

**There has never been reported an approximate figure of such enemy dead — perhaps wisely, in the post-Vietnam age of repugnance at "body counts" and the need to create a positive media image. Nevertheless, in those combat operations, the marines and army not only proved that to meet them in battle was a near death sentence, but also killed thousands of low-level terrorists and hundreds of top-ranking operatives who otherwise would have continued to harm Iraqi civilians and American soldiers.** Is Iraq relatively quiet today because many who made it so violent are no longer around? **Contemporary conventional wisdom tries to persuade us that there is no such thing as a finite number of the enemy. Instead, killing them supposedly only incites others to step up from the shadows to take their places. Violence begets violence. It is counterproductive,** and creates an endless succession of the enemy. **Or so we are told. We may wish that were true. But military history suggests it is not quite accurate. In fact, there was a finite number of SS diehards and kamikaze suicide bombers even in fanatical Nazi Germany and imperial Japan. When they were attrited, not only were their acts of terror curtailed, but it turned out that far fewer than expected wanted to follow the dead to martyrdom.** The Israeli war in Gaza is considered by the global community to be a terrible failure — even though the number of rocket attacks against Israeli border towns is way down. That reduction may be due to international pressure, diplomacy, and Israeli goodwill shipments of food and fuel to Gaza — or it may be due to the hundreds of Hamas killers and rocketeers who died, and the thousands who do not wish to follow them, despite their frequently loud rhetoric about a desire for martyrdom. Insurgencies, of course, are complex operations, but in general even they are not immune from eternal rules of war. **Winning hearts and minds is essential; providing security for the populace is crucial; improving the economy is critical to securing the peace. But all that said, we cannot avoid the pesky truth that in war — any sort of war — killing enemy soldiers stops the violence.** For all the much-celebrated counterinsurgency tactics in Afghanistan, note that we are currently in an offensive in Helmand province to "secure the area." That means killing the Taliban and their supporters, and convincing others that they will meet a violent fate if they continue their opposition. Perhaps the most politically incorrect and Neanderthal of all thoughts would be that the American military's long efforts in both Afghanistan and Iraq to kill or capture radical Islamists has contributed to the general safety inside the United States. Modern dogma insists that our presence in those two Muslim countries incited otherwise non-belligerent young Muslims to suddenly prefer violence and leave Saudi Arabia, Yemen, or Egypt to flock to kill the infidel invader. A more tragic view would counter that there was always a large (though largely finite) number of radical jihadists who, even before 9/11, wished to kill Americans. They went to those two theaters, fought, died, and were therefore not able to conduct as many terrorist operations as they otherwise would have, and also provided a clear example to would-be followers not to emulate their various short careers. That may explain why in global polls the popularity both of bin Laden and of the tactic of suicide bombing plummeted in the Middle Eastern street — at precisely the time America was being battered in the elite international press for the Iraq War. **Even the most utopian and idealistic do not escape these tragic eternal laws of war.** Barack Obama may think he can win over the radical Islamic world — or at least convince the more moderate Muslim community to reject jihadism — by means such as his Cairo speech, closing Guantanamo, trying Khalid Sheikh Mohammed in New York, or having General McChrystal emphatically assure the world that killing Taliban and al-Qaeda terrorists will not secure Afghanistan. Of course, such soft- and smart-power approaches have utility in a war so laden with symbolism in an age of globalized communications. But note that Obama has upped the number of combat troops in Afghanistan, and he vastly increased the frequency of Predator-drone assassination missions on the Pakistani border. Indeed, **even as Obama damns Guantanamo and tribunals, he has massively increased the number of targeted assassinations of suspected terrorists** — the rationale presumably being either that we are safer with fewer jihadists alive, or that we are warning would-be jihadists that they will end up buried amid the debris of a mud-brick compound, or that it is much easier to kill a suspected terrorist abroad than detain, question, and try a known one in the United States. In any case, the **president — immune from criticism from the hard Left, which is angrier about conservative presidents waterboarding known terrorists than liberal ones executing suspected ones — has concluded that one way to win in Afghanistan is to kill as many terrorists and insurgents as possible.** And while the global public will praise his kinder, gentler outreach, privately he evidently thinks that we will be safer the more the U.S. marines shoot Taliban terrorists and the more Hellfire missiles blow up al-Qaeda planners. Why otherwise would a Nobel Peace Prize laureate order such continued offensive missions? Victory is most easily obtained by ending the enemy's ability to resist — and by offering him an alternative future that might appear better than the past. **We may not like to think all of that entails killing those who wish to kill us, but it does, always has, and tragically always will — until the nature of man himself changes.**

**EFFECTIVE, CALCULATED VIOLENCE IS GOOD—THE ONLY WAY TO STOP TERRORISM IS TO KILL PEOPLE**

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**PETERS 2004** (Ralph, Fmr Military Officer and Author, Parameters, Summer)

Our military, and especially our Army, has come a long way. But we're still in recovery—almost through our Cold War hangover, but still too vulnerable to the nonsense concocted by desk-bound theoreticians. Evaluating lessons learned in Iraq, a recent draft study for a major joint command spoke of the need for “discourses” between commanders at various levels and their staffs. Trust me. We don't need discourses. We need plain talk, honest answers, and the will to close with the enemy and kill him. And to keep on killing him until it is unmistakably clear to the entire world who won. When military officers start speaking in academic gobbledygook, it means they have nothing to contribute to the effectiveness of our forces. They badly need an assignment to Fallujah. Consider our enemies in the War on Terror. Men who believe, literally, that they are on a mission from God to destroy your civilization and who regard death as a promotion are not impressed by elegant maneuvers. You must find them, no matter how long it takes, then kill them. If they surrender, you must accord them their rights under the laws of war and international conventions. But, as we have learned so painfully from all the mindless, left-wing nonsense spouted about the prisoners at Guantanamo, you are much better off killing them before they have a chance to surrender. We have heard no end of blather about network-centric warfare, to the great profit of defense contractors. If you want to see a superb—and cheap—example of “net-war,” look at al Qaeda. The mere possession of technology does not ensure that it will be used effectively. And effectiveness is what matters. It isn't a question of whether or not we want to fight a war of attrition against religion-fueled terrorists. We're in a war of attrition with them. We have no realistic choice. Indeed, our enemies are, in some respects, better suited to both global and local wars of maneuver than we are. They have a world in which to hide, and the world is full of targets for them. They do not heed laws or boundaries. They make and observe no treaties. They do not expect the approval of the United Nations Security Council. They do not face election cycles. And their weapons are largely provided by our own societies. We have the technical capabilities to deploy globally, but, for now, we are forced to watch as Pakistani forces fumble efforts to surround and destroy concentrations of terrorists; we cannot enter any country (except, temporarily, Iraq) without the permission of its government. We have many tools—military, diplomatic, economic, cultural, law enforcement, and so on—but we have less freedom of maneuver than our enemies. But we do have superior killing power, once our enemies have been located. Ultimately, the key advantage of a superpower is super power. Faced with implacable enemies who would kill every man, woman, and child in our country and call the killing good (the ultimate war of attrition), we must be willing to use that power wisely, but remorselessly. We are, militarily and nationally, in a transition phase. Even after 9/11, we do not fully appreciate the cruelty and determination of our enemies. We will learn our lesson, painfully, because the terrorists will not quit. The only solution is to kill them and keep on killing them: a war of attrition. But a war of attrition fought on our terms, not theirs. Of course, we shall hear no end of fatuous arguments to the effect that we can't kill our way out of the problem. Well, until a better methodology is discovered, killing every terrorist we can find is a good interim solution. The truth is that even if you can't kill yourself out of the problem, you can make the problem a great deal smaller by effective targeting.

### **WE'RE GOING TO WIN—SUSTAINED VIOLENCE IS THE KEY**

**Peters 2004** (Ralph, Fmr Military Officer and Author, Parameters, Summer)

It is not a matter of whether attrition is good or bad. It's necessary. Only the shedding of their blood defeats resolute enemies. Especially in our struggle with God-obsessed terrorists—the most implacable enemies our nation has ever faced—there is no economical solution. Unquestionably, our long-term strategy must include a wide range of efforts to do what we, as outsiders, can to address the environmental conditions in which terrorism arises and thrives (often disappointingly little—it's a self-help world). But, for now, all we can do is to impress our enemies, our allies, and all the populations in between that we are winning and will continue to win. The only way to do that is through killing. The fifth edition of the Shorter Oxford English Dictionary defines to “attrit” as to “wear down in quality or quantity by military attrition.” That sounds like the next several years, at least, of the War on Terror. The same dictionary defines “attrition” as “the gradual wearing down of an enemy's forces in sustained warfare.” Indeed, that is exactly what we shall have to do against religious terrorists. There is no magic maneuver waiting to be plotted on a map. While sharp tactical movements that bring firepower to bear will bring us important successes along the way, this war is going to be a long, hard slog. The new trenches are ideological and civilizational, involving the most fundamental differences human beings can have—those over the intentions of God and the roles of men and women. In the short term, we shall have to wear down the enemy's forces; in the longer term, we shall have to wear down the appeal of his ideas. Our military wars of attrition in the 21st century will be only one aspect of a vast metaphysical war of attrition, in which the differences between the sides are so profound they prohibit compromise. As a result of our recent wars and lesser operations, we have the best-trained, best-led, best-equipped, and most experienced ground forces in the world in our Army and Marine Corps. Potential competitors and even most of our traditional allies have only the knowledge of the classroom and the training range, while we have experience of war and related operations unparalleled in our time. We have the most impressive military establishment, overall, in military history. Now, if only we could steel ourselves to think clearly and speak plainly: There is no shame in calling reality by its proper name. We are fighting, and will fight, wars of attrition. And we are going to win them.

### **VIOLENCE IS NECESSARY TO COMBAT TERRORISM—ONLY PREEMPTIVE FORCE CAN WIN THE STRUGGLE**

**Carr 2002** (Caleb, Author and Military Historian, *The Lessons of Terror*, p 13-14)

The successful answer to the terrorist threat, then, lies not in repeated analyses of individual contemporary terrorist movements, nor in legalistic attempts to condemn their behavior in courts of international law, nor in reactionary policies and actions that punish civilian populations as much as the terrorists who operate from among them. Rather, it lies in the formulation of a comprehensive, progressive strategy that can address all terrorist threats with the only coercive measures that have ever affected or moderated terrorist (or any other military or paramilitary) behavior: preemptive military offensives aimed at making not only terrorists but the states that harbor, supply, and otherwise assist them experience the same perpetual insecurity that they attempt to make their victims feel. The methods must be different, of course, for, as stated, terror must never be answered with terror; but war can only be answered with war, and it is incumbent on us to devise a style of war more imaginative, more decisive, and yet more humane than anything terrorists can contrive. Such a strategy does indeed exist; but it cannot be delineated without first tracing both the long history of warfare against civilians that has produced the present problem of terrorism in the first place, as well as the saga of those efforts that have been made in the past to address and curtail that savage tradition.

## **AT: “bin Laden’s Death Decreased Terrorist Risk”**

### **OSAMA WILL JUST BE REPLACED**

Anna **Badkhen** is the author of Peace Meals and Waiting for the Taliban, The Fight Goes On, Foreign Policy, May 12, **2011**, [http://www.foreignpolicy.com/articles/2011/05/11/the\\_fight\\_goes\\_on?page=0,1](http://www.foreignpolicy.com/articles/2011/05/11/the_fight_goes_on?page=0,1) That anyone should consider bin Laden's death auspicious to the course of the counterinsurgency is a surprising notion to many in northern Afghanistan, where the Taliban have been gaining rapid momentum over the past 18 months. In Balkh province, village elders, farmers, and taxi drivers have told me they saw no connection at all between the killing of al Qaeda's founder and war -- Afghanistan's near-permanent state for millennia, uninterrupted since the Soviet invasion in 1979. In Mazar-e-Sharif, where an enraged mob lynched 12 U.N. workers last month, Balkh provincial police chief, General Ismat "They will produce 1,000 more Osamas!" he fumed behind a broad desk decorated with a jade plaque bearing his name and a red soccer ball wrapped in a garland of papier-mâché roses. "It is foolish to think that if someone kills the headmaster of a school the school will cease existing. Al Qaeda is like a breach in the hull of a ship. Killing Osama is like bailing water, and saying that we've closed the breach."ullah Alizai, cackled with derision when I brought up bin Laden's name.

### **AL QAEDA IS DECENTRALIZED, DEATH HAS NO IMPACT**

John Arquilla teaches in the special operations program at the U.S. Naval Postgraduate School. His latest book is Insurgents, Raiders and Bandits., May 10, 2011, [http://www.foreignpolicy.com/articles/2011/05/10/the\\_new\\_seeds\\_of\\_terror?page=0,1](http://www.foreignpolicy.com/articles/2011/05/10/the_new_seeds_of_terror?page=0,1) “The New Seeds of Terror”

The trouble with "high-value targets" is that their value may not be so high. During the years it took to find and terminate al Qaeda's No. 1, about 20 No. 3s have been killed. The problem is that No. 1s are not essential to overall operations, and in a network, everybody is No. 3. Al Qaeda, now one of the flattest, most decentralized networks in the world, will live on.

A rash of recent terrorist attacks by al Qaeda affiliates in Iraq, Morocco, and Yemen, and a thwarted plot in Germany, suggest that the network may even be mounting a small-scale, but still global, new terror offensive. The lack of "spectaculars" should not be seen as a sign of a weakening al Qaeda, but rather as an indicator of a shift in strategy. Watch for more small strikes in the weeks and months ahead, launched around the world.

### **EXTREMISM STILL STRONG**

Anthony **Cordesman**, CSIS, May 20, **2011**, The Death Of Bin Laden and the Shape of Threats to Come, <http://csis.org/publication/death-osama-bin-laden-and-shape-threats-come>

We need to face the fact that all of the social, political and religious forces that triggered the terrorist and extremist threat are still in place. Moreover, they have been reinforced in extremist eyes by the fighting in Iraq and Afghanistan, by the political upheavals in the Middle East and other Muslim states, and by anger at both local regimes and the US and other Western states for what all too many in the region perceive as attacks on Arabs and Islam. It is very unlikely that Bin Laden’s death, or even the destruction of Al Qa’ida, can end or seriously undercut the broader threat from extremism and terrorism.

## **AT: “War on Terrorism Bad Arguments”**

### **GENERAL “WAR ON TERRORISM” BAD ARGUMENTS DO NOT RENDER SPECIFIC COMPONENTS IMMORAL**

Alex J. Bellamy, **International Relations Professor-University of Queensland, 2008**, Fighting Terror: Ethical Dilemmas, p. 70

The idea of a war on terror may be inherently unjust, but that does not rule out the possibility that individual components of that war, such as the interventions in Afghanistan, Iraq, Yemen and Somalia, might be just. The point of this chapter has not been to argue that the use of force in response to terrorism is unjust but that the articulation of a global war on terror cannot be justified, primarily because its parameters are too broad. If governments are to do better in providing moral justifications for the recourse to force in relation to the war on terror, it is important to think of it as not one endless and seemingly limitless war but as a series of distinct and separate wars. Any military action designed to combat terrorism must either be a specific act of self-defense (see the following chapter) or must be directed against a sufficiently bad prior or imminently apprehended wrong.

## **AT: “War on Terrorism Has Destroyed Civil Liberties”**

### **RESPONSE TO 9/11 DID NOT THREATEN CIVIL LIBERTIES**

Jan C. Ting, Professor of Law, Temple University, 2002, Connecticut Law Review, 34 Conn. L. Rev. 1145, p. 1145

Now, more than six months after the September 11 terrorist attacks on the United States, many things are returning to normal. Significant military victories have been achieved in Afghanistan. Americans are flying again, taking advantage of bargain vacation fares. Economists announce that the recession is ending. The stock market is up above its level before September 11. Partisan politics have returned to Washington, D.C.

The sky has not fallen. Americans are no longer scrambling to acquire gas masks and Cipro. Further terrorist acts on the scale of September 11 have not proven to be imminent. And the traditional rights and civil liberties of Americans have not been swept aside in the wake of our government's response to terrorism.

### **WAR ON TERRORISM HAS NOT OBLITERATED CIVIL LIBERTIES**

Daniel M. Filler, Associate Professor, University of Alabama School of Law, 2003, Virginia Journal of Social Policy & the Law, 10 Va. J. Soc. Pol'y & L. 345, p. 346

To be sure, the United States government did not completely obliterate civil liberties. n4 After early criticism, the President modified plans for short-cut military tribunals, the Department of Justice claimed its attorney monitoring policy applied to a small number of inmates, and federal courts slowly pushed back against the Administration's most aggressive detention and secrecy policies. Contrary to the view of many in the academic community, some scholars even argue that the nation's dramatic new criminal law, the USA PATRIOT Act, n5 does not substantially expand governmental powers. n6 The evidence is mixed, but it appears that in the period since early 2002, the government's policing and intervention strategies have been less intrusive than were originally feared.

### **WAR ON TERRORISM HAS EXERCISED RESTRAINT**

Eric Muller, Professor, University of North Carolina School of Law, 2002, West Virginia Law Review, 104 W. Va L. Rev. 571, p. 592

"The moral judgments of history" are, of course, unavailable to us today. Only our children, or perhaps their children, will know for sure how history will judge this country's domestic response to September 11 and the peril of international terrorism. But this does not absolve us of responsibility, because we are George Bush's and John Ashcroft's "contemporaries." If anything is to restrain them, it is our political judgments.

Five months into this war on terrorism, we have some evidence that the system of restraint that Justice Jackson envisioned is working. At several key moments, articulate voices have challenged the government's plans. By and large, the administration has responded constructively. In the healthy light of public scrutiny, something like a middle course has appeared.



## **AT: “No Checks on Abuse of Power”**

### **US WAR ON TERRORISM MACHINERY INCLUDES SAFEGUARDS FOR CIVIL LIBERTIES**

Edwin Meese, former Attorney General, September 20, 2004, Heritage Special Report, "The Patriot Act Reader",

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=72258>, p 17-8

There are officials to guard civil liberties provided for in both the Justice Department and the Department of Homeland Security. There's a privacy officer in the Department of Homeland Security whose sole responsibility is to guard against invasions of privacy that are contrary to the spirit of this legislation. There is now a provision in the Patriot Act for money damages against the government, rather than simply against an offending officer (who's usually judgment proof). Thus, if information gained through these various investigative techniques is abused, the person who is harmed can now get into the deep pocket of the federal government to satisfy their money damages. The Department of Justice Inspector General is required to investigate any allegation of abuse in any part of a terrorism investigation.

And finally, the Attorney General and the Department of Homeland Security are charged with making numerous reports to Congress so that the relevant committees of Congress can provide oversight. At the time of the reauthorization, if there are things that need to be changed or updated or corrected, lawmakers can act based upon full information coming from these reports. This is the most extensive reporting system of any statute in the entire federal code.

### **MANY CHECKS PREVENT SERIOUS CIVIL LIBERTY INFRACTIONS**

Joel Rosenzweig et al, Heritage Foundation, September 20, 2004, Heritage Special Report, "The Patriot Act Reader",

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=72258>, p. 22

What accounts for this seeming change in contemporary context? Though little empirical evidence exists, a rough analysis can identify a number of factors, all of which will contribute to greater oversight in the exercise of executive authority, constraining the greatest excesses. These factors include:

--A more activist Supreme Court that is far more willing to overturn executive branch action, acting as a limit on excessive power. Earlier times of crisis all occurred before the "rights revolution" of the 1960s and the growth of judicial power. Indeed, the current Rehnquist Court has invalidated more acts of Congress than any previous Court, exhibiting a high degree of involvement in curtailing authority.

--A more partisan Congress. Though sometimes seen as a bad thing, the growth of partisanship has created at least one positive benefit: a growth in the "market" for oversight of the executive branch. Since the Watergate era, we have seen an increasing use of congressional investigative authority - sometimes for good, and sometimes for ill. But the prospect of aggressive congressional oversight acts as a check on executive power, as even the prospect of public censure has the in terrorem effect of preventing abuse.

--The growth of investigative journalism. Clearly, this is another change that has some potential adverse consequences. But few can deny that post-Watergate, the press has come to more aggressively serve an important public function, exposing activities that some might otherwise prefer to keep secret. None can imagine a return to the days when the press actively participated in concealing FDR's injuries or JFK's dalliances. And that means, equally, that the prospect of secret prosecutions and secret searches and seizures is minimal at best.

--The risk of the public interest groups. In no other time did Americans organize themselves into public interest groups in the way they do now. No other era saw the existence, for example of numerous public interest litigation groups like the American Civil Liberties Union. These organizations, through their public information and litigation activities, act as an important check on the exercise of executive authority. They are, in effect, the "canary in the mineshaft," serving as an early warning system of abuse.

--The increase in the public's ability to monitor government. Though technology assuredly offers greater opportunity for our government to monitor our activities, that same technology holds the promise of greater public accountability by enhancing the transparency of government functions.

--And finally, the public seems far more educated about civil liberties today than at any time in the past. With the rise of the Information Age and the Internet, we are far more able to individually gather information necessary to make decisions and to organize a response to government power if one is deemed necessary. From the Ozzie and Harriet quiet of suburbia in the 1950s, we have come to a point where many Americans are vitally concerned about freedom, liberty, and government action and exercise their franchise with these concerns in mind.

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## **SUBSTANTIAL REFORMS ADOPTED IN THE LATE '60s TO CURB LAW ENFORCEMENT ABUSE**

**Jeff Breinholt, Deputy Chief, Counterterrorism Section, DOJ, 2004**, Texas Review of Law & Politics, 9 Tex. Rev. Law & Pol. 17, p. 26-7

Did American law-enforcement in the 1960s and 1970s go too far? There is no question that they did. The real issue is whether [\*27] the specific instances of "going too far" involved those activities currently being undertaken by today's federal agents and prosecutors, a type of conscientious parsing rarely attempted by critics today. Fortunately, this is exactly the type of analysis courts undertake when faced with challenges to governmental conduct. Case law is important.

Published judicial opinions concerning law-enforcement activities in the 1960s and 1970s are a rich source of insight and fascinating reading when one considers the more recent debates over security and personal privacy. Although the Department of Justice and the FBI were able to effectively disrupt a number of lethal Vietnam-era terrorist plots - a point frequently overlooked by commentators - their overall efforts against radical groups were closely scrutinized, heavily criticized, intensely challenged by investigative targets, and, in many cases, publicly censured by federal judges. The result was a series of legal reforms that are firmly institutionalized and are now a permanent part of our legal landscape. They make a return to the bad-old-days virtually impossible. This should be reassuring to all but those who are inclined to believe the worst about federal law-enforcement.

## **9-11 HAS NOT CHANGED ETHICAL RULES THAT GOVERN PROSECUTORS**

**Alan Gershel, Assistant US Attorney, Eastern District of Michigan, 2004**, Thomas M. Cooley Law Review, 2004, 21 T.M. Cooley L. Rev. 1, p. 9-10

In terms of the impact on what we do, it may surprise many of you when I say that by and large the work of prosecutors has remained the same. The work that we do, both pre- and post-9/11, is essentially the same. We live by the same ethical rules and the same rules of law.

There has certainly been a profound impact on U.S. Attorney's offices and certainly the one here in this district, the Eastern District of Michigan. When I say that, I'm referring to the retooling of our [\*10] resources. We now, for the first time, have a counter-terrorism unit staffed by senior prosecutors whose job is to investigate cases that may involve terrorism, both domestic and international. With our work being that of prevention, we are certainly aggressive now in looking at cases where there may be some linkage or nexus to terrorist activities.

But again, having said that, we live by the same ethical considerations that we have had to live by, whether it is the Rules of Professional Conduct here in the State of Michigan or whether it's the McDade Legislation, n1 which was passed a couple of years ago and mandates that prosecutors have to abide by the ethical rules of the jurisdiction where they practice in.

## **CHECKS ON EXECUTIVE EXCESSES COMING FROM MANY QUARTERS NOW**

**Paul Rosenzweig, Senior Legal Research Fellow, Heritage Foundation, 2004**, Duquesne University Law Review, 42 Duq. L. Rev. 663, p. 721-2

How, then, should we approach the practical questions of governmental conduct arising in a post-September 11 world? With our eyes wide open and with a dose of healthy skepticism. The good news is that we have plenty of both. Courts and the Congress are casting a jaundiced eye at the administration's more extravagant and overblown proposals for reform, while accommodating and expediting the more urgent and reasonable requests. Already, for example, the courts have rejected governmental claims to the detention hearings secret and begun to scrutinize the closing of immigration hearings and the indefinite detention of individuals as material witnesses or unlawful combatants. n172 The press has accepted the challenge of fulfilling its traditional function as a check on authoritarian excess. Most importantly, the pendulum of public opinion has steadied as the initial shock of terrorism wears off. The American public instinctively understands that prudential adjustments during times of crisis do not (and should not) reset the balance between liberty and security permanently. Once the necessity of war has lapsed, we anticipate a return to the general rule of constitutional liberty.

Thomas Jefferson said: "The natural progress of things is for liberty to yield and government to gain ground." n173 While accommodating the need for government to ensure domestic tranquility in these troubled times, a watchful America can guard against this natural tendency.

## **COURT MORE VIGILANT AT CHECKING LEGISLATIVE/EXECUTIVE EXCESSES THAN IN THE PAST**

**Thomas E. Baker, Professor of Law, Florida International University College of Law, 2002**, Nevada Law Journal, 3 Nev. L.J. 23, p. 26-7

President Lincoln had only executive powers to depend upon, but the presidents during the world wars followed congressional authorizations. As a result, the powers of Presidents Wilson and Roosevelt were maximized. n18 The [\*27]current Congress seems eager to grant President Bush any power he deems appropriate for the war on terrorism. n19 However, the role of the federal courts -- especially that of the Supreme Court -- has greatly expanded in jurisdiction, prestige, and

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influence since World War II. n20 This has coincided with developments in the theory and precedents of civil rights and civil liberties, such that there is more tolerance for dissent and for dissenters in the courts and in the popular culture today. The contemporary Supreme Court certainly has demonstrated an institutional hubris when it comes to judicial review. n21

## CONGRESS AND COURTS CHECK ABUSES OF EXECUTIVE POWER

Michael Stokes Paulsen, Professor of Law, University of Minnesota Law School, 2004, Notre Dame Law Review, July, 2004, 79 Notre Dame L. Rev. 1257, p. 1292-3

As suggested at the outset of this Article, Congress has a substantial measure of power to direct, control, limit, and check the President in this area. The Necessary and Proper Clause gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." n75 If the Constitution implies a rule of necessity, and if the President is, by virtue of the Presidential Oath Clause, the principal interpreter and executor of the constitutional law of necessity, it remains the case that Congress has concurrent power in this area, by virtue of the Necessary and Proper Clause. Congress has power to make laws for carrying into execution the power to preserve the nation. That power is both a power to further the President's actions and a power to interpret the "Constitution of Necessity" and check presidential actions that abuse it. In theory, I believe Congress could pass a statute providing that "the President is directed to take all necessary action to preserve, protect, and defend the nation and its citizens, in time of emergency or crisis, without awaiting specific congressional authorization." If the Presidential Oath Clause suggests the existence of a constitutional power of self-preservation, Congress can legislate to implement that power. In theory, Congress equally could pass a statute purporting to define and limit the circumstances in which such a power may be exercised - much as the War Powers Resolution has sought to define and regulate the extent of presidential war powers. n76 Whether such legislation could effectively constrain presidential action would be (as with the case of the War Powers Resolution) a function of the interaction of the branches, political circumstances, the good faith of the respective political branches, and the perceived imperatives of the situation.

[\*1293] Moreover, Congress possesses all of its usual high trump powers with which to check the President: control over appropriations, a check on appointments, and ultimately the power to impeach and remove a President it believes to have abused the powers and duties of the office. In the end, these powers will work to check an abusive President, or nothing will. The Framers believed that term of office, congressional powers generally, and the power of impeachment, would serve as the only appropriate, but nonetheless entirely sufficient, checks on the President. n77

The courts, too, can serve to check the President. The "Constitution of Necessity" is part of the Constitution, and while it does not supply crystalline standards readily susceptible of judicial decision, that does not mean that no proper case could ever come before the judiciary; nor does it mean that the judges should dismiss all such matters as "political questions" or that the judges would be obligated to defer to the President's judgments in all such matters. That the President's duty is primary, and his responsibility nonabdicable, does not mean that the judiciary (or Congress) lacks any proper constitutional role and should acquiesce in whatever the President does. That the President is charged with the primary role in making judgments concerning the degree of necessity does not mean that the judiciary may not render decisions finding a particular judgment to be outside the range of legitimate evaluations of necessity. n78

## PUBLIC CHECKS ABUSES IN NAME OF WAR ON TERRORISM

Joel Rosenzweig, Heritage Foundation, September 20, 2004, Heritage Special Report, "The Patriot Act Reader",

<http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=72258>, p. 5

Notwithstanding its laudable objectives, much misinformation about the Act abounds and there are numerous scare stories about the potential for abuses in using the Act. However, Americans have strengthened substantially their ability to examine, oversee, and correct abuses of executive power. The public is in a stronger position today than it ever has been before to ensure that civil liberties are not infringed. And the power of oversight gives Americans freedom -freedom to grant the government powers, like those found in the Patriot Act, when the need arises, secure in the knowledge that they can restrain the exercise of those powers appropriately. In short, one lesson from history is that Americans should be utterly unwilling to adjust their response to liberty and security in today's crisis of terrorism - for they have the capacity to manage that adjustment, and readjust if necessary.

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**\*\*Drone Strikes Good\*\***

## **Uniqueness: Obama Committed to Drone Strikes**

### **DRONE STRIKES ARE A KEY ASPECT OF OBAMA'S COUNTERTERRORISM POLICY**

Benjamin McKelvey, JD Candidate, Law Review Editor, 2011, "Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power," Vanderbilt Journal of Transnational Law, 44 Vand. J. Transnat'l L. 1353, p. 1357

Targeted killing is an "extra-judicial, premeditated killing by a state of a specifically identified person not in its custody." The CIA conducts the majority of U.S. targeted killings using missile strikes from unmanned aerial vehicles, more commonly known as Predator drones. According to John Rizzo, the CIA's former acting general counsel, the targeted killing program is "basically a hit list" in which the "Predator is the weapon of choice, but it could also be someone putting a bullet in your head." These covert drone strikes are an integral part of U.S. counterterrorism strategy and have increased significantly during the Obama Administration.

### **TARGETED KILLING IS NOW AN INTEGRATED PART OF US COUNTERTERRORISM STRATEGY**

Kenneth Anderson, Law Professor, American University-Washington College of Law, 2009,

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 351-2

Call it a "war on terror" or call it something else; it doesn't really matter. A full response to terrorism, to al Qaeda and beyond, requires action across all three areas – criminal law, armed conflict, and intelligence functions, including covert deadly force and targeted killing. The Obama administration and the administrations that follow it will rely increasingly on intelligence-based use of force in counterterrorism operations undertaken outside the United States. Whether the activity is characterized as a legal matter or given some euphemistic label that improves its public acceptance, U.S. administrations will rely on targeted killing as a means of dealing with suspected terrorists—with Al Qaeda; with its successors, imitators, and emulators; and with those who come after it, whether they share similar or dissimilar ideological causes. And administrations will do so whether or not Congress has passed a successor to the Authorization for Use of Military Force. The Predator and Hellfire missiles were identified early on by candidate Obama as the weapons of the future, and the Obama administration is not wrong to see the strategic advantages of the Predator, now and into the future, as the United States gradually seeks to ratchet down its full-on, overt wars.

### **US HAS RELIED ON A TARGETED KILLING APPROACH**

Philip Alston, Special Rapporteur on Extrajudicial Executions, 2011, Unmanned Aircraft Systems (Drones) and Law, p. 89

The United States has used drones and airstrikes for targeted killings in the armed conflicts in Afghanistan and Iraq, where the operations are conducted (to the extent publicly known) by the armed forces. The US also reportedly adopted a secrete policy of targeted killings soon after the attacks of 11 September 2001, pursuant to which the Government has credibly been alleged to have engaged in targeted killings in the territory of other States. The secret targeted killing program is reportedly conducted by the Central Intelligence Agency (CIA) using "Predator" or "Reaper" drones, although there have been reports of involvement by special operations forces, and of the assistance of civilian contractors with the implementation of the program.

### **TARGETED KILLINGS BECOMING THE NEW NORM**

Elke Scharz, editor, Justice in Conflict, 2011, "Is Killing the New Justice? The Murky Morality of Target Killings," [http://justiceinconflict.org/2011/10/27/is-killing-the-new-%E2%80%98justice%E2%80%99-the-murky-morality-of-target-killings/]

The fact that a public outcry against the extra-judicial assassination of a human being becomes audible (aside from the controversial killing of enemy #1 bin Laden of course) only when a US citizen is concerned starkly highlights the normalised extra-judicial status of all foreign drone targets in the perception of the international public. The gloves that came off during the Bush administration are still off and killing as the new justice is beginning to supersede the norm against assassinations.

The norm against political assassinations has been in serious peril since the Bush administration first overtly conceded the strategic use of target killings, framed as a military act to weed out and eliminate high-level Al-Qaeda members, in 2002. This norm continues to deteriorate with Obama at the helm, who has stepped up the drones programme considerably since he took over from Bush junior in 2008.

Today, there are roughly double the number of drone attacks per week in regions deemed terrorist hotbeds, specifically Pakistan. Since 2004, these drone strikes are reported to have killed between 1,579 and 2,490 individuals, whereby some analyses estimate the civilian casualty rate among these statistics to be as high as

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20%. The vast majority of these deaths have occurred in 2010. Since June 2011, the US has expanded its drone programmes in Somalia and it has been reported that some 145 drone strikes have contributed to the capture (and, one might make the case, the killing) of Gaddafi.

## **US INCREASING RELIANCE ON UNMANNED AIRCRAFT SYSTEMS AGAINST TERRORISTS**

Lydia **de Beer, Norwegian Air Force, 2011**, Unmanned Aircraft Systems (Drones) and Law, p. 26  
Target killing is a well known phenomenon in the United States' fight against terrorism. Although targeted killing has been used by governments around the world. The tactic can raise complex questions and lead to contentious disputes as to the legal basis for its application, who qualifies as an appropriate "hit list" target, what circumstances must exist before the damage, and a number of others pros and cons. Opinions range from people considering it a legal form of self-defense that reduces terrorism, to people calling it an extra-judicial killing that lacks due process, and which leads to more violence.

The use of UAS' in target killing is just a small proportion of the total use of UAS'. However, there is a lot to say about the legality of UAS' use in this perspective.

## **Link: Military Framework Good: Drone Strikes**

### **LAW ENFORCEMENT PARADIGM WOULD PROHIBIT DRONE STRIKES**

Tung Yin, **Professor of Law-Lewis & Clark, 2011**, National Security, Civil Liberties, and the War on Terror, eds. M. Darmer & R. Fybel, p. 106

It would be hard to justify the use of air-to-ground missile strikes from military-operated aerial drones under the Law Enforcement Paradigm. In fall 2002, for example, the United States used a Predator drone to destroy a vehicle in Yemen that was carrying Qaed Salim Sinan al-Harethi and four other men (one of whom was an American citizen), of the bombing of the USS Cole and an active al Qaeda member. Numerous legal commentators voiced outrage over [what] they perceived to have been an extrajudicial assassination. The United Nations special rapporteur wrote a report reaching a similar conclusion and sought an explanation from the United States. Notably, however, there was not similar widespread condemnation from foreign governments.

### **DETERMINATION OF FRAMEWORK VITAL TO LEGAL ANALYSIS OF TARGETED KILL POLICIES**

Nils Melzer, **Legal Adviser-International Committee of the Red Cross, 2008**, Targeted Killing in International Law, p. 55-6

Analyses on the international lawfulness of targeted killings often begin by questioning whether these operations are governed by IHL or by human rights law. As far as the applicability of IHL is concerned, it is generally recognized that it presupposed the existence of a situation of armed conflict. Most legal analyses focusing on the policies of targeted killing adopted by Israel and the United States address the question as to whether the Israeli-Palestinian confrontation, and the so-called “war on terrorism” can be regarded as an international or non-international armed conflict within the meaning of IHL. The diverging conclusions reached by the authors involved suggest that the legal concept of “armed conflict” requires further clarification. Particularly, the Israeli-Palestinian context of belligerent occupation also raises the question as to what extent a party to the conflict, and especially an occupying power, must comply with human rights standards despite the applicability of IHL. In this respect it is generally found that, outside the conduct of hostilities, the use of lethal force against civilians must be governed by the human rights standard of strict necessity.

### **TWO INSTITUTIONAL FRAMEWORKS GOVERN TARGETED KILLING**

Lydia de Beer, **Norwegian Air Force, 2011**, Unmanned Aircraft Systems (Drones) and Law, p. 31-2

Nils Melzer in his book *Targeted Killing in International Law* from 2008 posits that the legal regulation of targeted killing should be understood to comprise two normative paradigms. The “hostilities paradigm” governs the targeted killing, as an integral part of the conduct of hostilities, of any person “not entitled to protection against direct attack.” All other targeted killings, whether at home or abroad, are governed by the “law enforcement paradigm.” This distinction does not turn on the existence of an armed conflict: The targeted killing of a civilian who is not directly participating in hostilities will fall within the law enforcement paradigm even if it takes place in the midst of an armed conflict. Melzer identifies criteria for lawful targeted killing under each paradigm. Target killing that falls within the law enforcement paradigm must have a legal basis in domestic law, be preventative rather than punitive, have protecting human life from unlawful attack by the target as its exclusive purpose, “be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose,” and be the undesired outcome of an operation planned and conducted to minimize recourse to lethal force. In contrast, with respect to a targeted killing that falls within the hostilities paradigm, he concludes that it must be “likely to contribute effectively to the achievement of a concrete and direct military advantage without there being an equivalent non-lethal alternative,” not be directed against a civilian or other individual entitled to protection against direct attack, abide by the requirement of proportionality with respect to collateral damage, “be planned and conducted so as to avoid erroneous targeting”: and otherwise comply with the precautionary measures required by International humanitarian law, “be suspended when the targeted individual surrenders or otherwise falls hors de combat, regardless of the forces feigning non-combatant status or otherwise by resort to perfidy,” and “not be conducted by resort to poison, expanding bullets or other prohibited weapons and must respect the restrictions imposed by International humanitarian law on booby-traps and other devices.

### **CHARACTERIZATION OF TERRORISM AS A “WAR” CRITICAL TO JUSTIFICATION FOR TARGETED KILLING POLICY**

Philip Alston, **Special Rapporteur on Extrajudicial Executions, 2011**, Unmanned Aircraft Systems (Drones) and Law, p. 99

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On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists (“non-state armed groups”). The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

### **MILITARY FRAMEWORK FOR STRUGGLE AGAINST AL QAEDA JUSTIFIES TARGETED KILLS**

Daniel Statman, *Philosophy Professor University of Haifa, 2005*, *Philosophy 9/11: thinking about the war on terrorism*, ed. T. Shanahan, p. 189

If we are to accept that the struggle against Al Qaeda and, likewise, that against the Palestinian armed organizations can be described as war, it follows that just as the US can use lethal means to kill Al Qaeda members, so too can Israel do so to kill Hamas or Tanzim members – just like in conventional war. Yet, while in conventional wars, enemy combatants are identified by their uniform and are located in camps, bases, and bunkers separate from the civilian population, in wars of terror, the fighters hide amongst the civilian population, which shelters them and supports them by various means. Hence, the latter wars do not take the conventional form of soldiers from one side of the conflict fighting directly against soldiers from the other side in an open space – in trenches, in the air, or at sea, remote from civilian life. Indeed, they take a rather different form. If we are to continue to adhere to the fundamental idea of just war theory, namely, that wars are fought between combatants only and should avoid targeting non-combatants, we must conclude that in wars against terror, too, the combatants of the terrorized country may direct their weapons only at members and activists in the terror organizations against which they are fighting.



## **Military Framework Justified**

### **WAR FRAMEWORK APPROPRIATE TO EVALUATE MORALITY OF TARGETED KILLING**

**Major Matthew J. Machon, US Army, 2006**, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [www.fas.org/irp/eprint/machon.pdf], p. 47-8

Although the debate surrounding the legitimacy of the use of force against trans-national terrorists under the concept of the inherent **right of self-defense** authorized within Article 51 of the U.N. Charter **may never be completely resolved, the U.S.** has, and **will continue, to combat** al-Qaeda and other trans-national **terrorist organizations under the context of the law of war.** Specifically:

“**when a nation employs Article 51 to justify a use of force in its own defense,** or the defense of another state, **the laws of war control as they would in any formally declared conflict.** Therefore, under an Article 51 action, any state-sanctioned killing by a victim state would not be an assassination so long as it is not accomplished by treachery or outlawry, as described earlier.”

Despite criticism and uncertainty surrounding the invocation of Article 51, **the U.S., by acting under it’s broad interpretation of Article 51, has made the war on terror the equivalent of an armed conflict. The U.S. policy of targeted killing of specific terrorists must therefore be assessed within the jurisdiction of the law of war.** Is Osama bin Laden and other terrorist leaders legitimate targets according to the law of war? Does the law of war adequately address the combatant or noncombatant status of terrorists?

## **Targeted Killings Justified: On Balance**

### **TARGETED KILLING ON BALANCE JUSTIFIED – EFFECTIVE, MORAL AND LEGAL**

**Kenneth Anderson, Law Professor, American University-Washington College of Law, 2009,**

**Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 346**

It is a slight exaggeration to say that Barack Obama is the first president in US history to have campaigned in part on a platform of targeted killing—but not much of one. During the campaign, he openly sought to one-up the Republican nominee, Senator John McCain, in his enthusiasm for the use of targeted strikes in Pakistan against al Qaeda figures. “You know,” he said in his speech at the Democratic National Convention, “John McCain likes to say that he’ll follow Osama Bin Laden to the Gates of Hell, but he won’t even go to the cave where he lives.”

That Obama would, as president, follow Bin Laden to his cave, with or without the cooperation of the Pakistani government, he made perfectly clear. “If we have actionable intelligence about high-value terrorist targets and [then] President [Perez] Musharraf won’t act, we will,” he said in another speech. Indeed, while he criticized President Bush for being too aggressive in his approach to many aspects of counterterrorism operations, his criticism with respect to targeted killing was the polar opposite: “The Bush administration has not acted aggressively enough to go after Al Qaeda’s leadership,” he said. “I would be clear that if Pakistan cannot or will not take out Al Qaeda leadership when we have actionable intelligence about their whereabouts, we will act to protect the American people. There can be no safe haven for Al Qaeda terrorists who killed thousands of Americans and threaten our homeland today.”

Obama did not take long, on assuming office, to begin keeping his promise. On January 23, 2009, a mere three days into his presidency, strikes by Predator drones in the tribal areas of Pakistan destroyed two compounds and killed numerous people, reportedly including a high-value target. Strikes have continued, even expanded, since then, and administration officials have made clear that they have no plans to curtail them – even as they reined in coercive interrogations and announced the closure of Guantanamo Bay.

Obama was right as a candidate and he is correct as president to insist on the propriety of targeted killing—that is, the targeting of a specific individual to be killed, increasingly often by means of high-technology, remote-controlled Predator drone aircraft wielding missiles from a standoff position. The strategic logic that presses toward targeted standoff killing as a necessary, available, and technologically advancing part of counterterrorism is overpowering. So too is the moral and humanitarian logic behind its use. Just as crucial programs of Predator-centered targeted killing are under way now in Afghanistan, such programs will be an essential element in US counterterrorism operations in the future – against targets having little of anything to do with today’s iteration of the war on terror. Future administrations, even if they naturally prefer to couch the matter in softer terms, will likely follow the same path. Even if the whole notion seems to some disturbingly close to arbitrary killing, not open combat, it is often the most expedient – and, despite the civilian casualties that do occur, the most discriminatingly humanitarian – manner to neutralize a terrorist without unduly jeopardizing either civilians or US forces.

## **Morally Justified: Alternative to War**

### **TARGETED KILLING MORALLY PREFERABLE TO THE ALTERNATIVE RESPONSES TO TERRORISM – MANY REASONS**

Daniel Statman, **Philosophy Professor University of Haifa, 2005**, Philosophy 9/11: thinking about the war on terrorism, ed. T. Shanahan, p. 191

The moral legitimacy of targeted killing becomes even clearer when compared to the alternative means of fighting terror—that is, the massive invasion of the community that shelters and supports the terrorists in an attempt to catch and kill the terrorists and destroy their infrastructure. This mode of operation was adopted, for example, by the US and Britain in Afghanistan and by Israel in its “Operation Defensive Shield” carried out after the terrorist Passover massacre in March 2002. While many claim this method to be morally preferable to targeted killing—probably because it bears more of a resemblance to “real” war—I believe the opposite to be true. First, invading a civilian area inevitably leads to the deaths and injury of far more people, mostly innocent people, than does careful use of targeted killing. Second, such actions bring death, misery, and destruction to people who are only minimally involved (if at all) in, or responsible for, terror or military attacks, whereas with targeted killing, collateral damages is significantly reduced (though not prevented altogether). Hence, targeted killing is the preferable method not only because, on a utilitarian calculation, it saves lives—a very weight moral consideration—but also because it is more commensurate with a fundamental condition of justified self-defense, namely, that those killed are responsible for the threat posed. Members of Hamas in Gaza are far more responsible for the threat of terror to Israel than their non-activist neighbors are; hence it is preferable from a moral standpoint to target the former directly rather than invade Gaza and inevitably cause great injury to the latter and to the general populations.

### **TARGETED KILLINGS ARE MORAL BECAUSE THEY ARE AN EFFICIENT ALTERNATIVE TO WAR**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 4

Although democracies seek to avoid violence, it cannot be completely foresworn, and democratic assassination policies seem to be a possible means of dealing with otherwise unmanageable authoritarian leaders and terrorists. As a result, assassination is a much more efficient and morally justified means of international policy than war. Assassinations are highly moral because they per se minimize the destruction done to human welfare. As well, assassinations are highly efficient, in that they frequently lead to favorable changes in policy, as seen from the perspective of the assassinating nation. Moreover, they are inexpensive in contrast to policing actions or formal wars, and have fewer negative international repercussions.

Violence itself should remain the last resort for democratic states, but when democracies must engage in violence, assassination should be their primary option, not their last resort.

### **TARGETED KILLINGS MORAL UNDER UTILITARIANISM – REDUCES CASUALTIES**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 3-4

As early as 1516, Thomas More proposed that the assassination of political leaders could be useful both as a tool of statecraft and “as a means of sparing ordinary citizens the hardships of war for which their leaders were responsible.” This proposal of tyrannicide, while perhaps a bit shocking in its boldness, rightfully deserves consideration in an era in which the traditional state expression of power, war, now threatens to be more catastrophic than ever before. Democratic states, which seek to minimize human suffering, must now seriously consider assassination as an alternative to war. This thesis is a study of the overall feasibility and justification of political assassination as a tool of foreign policy for democratic states. It is intended to be as normative in its suggestions for utilizing assassination as it is descriptive of assassination’s moral concerns and historical efficiency.

### **TARGETED KILLING OF ENEMY LEADERS – LIKE BIN LADEN – MORALLY PREFERABLE TO KILLING THOUSANDS IN WAR**

Daniel Statman, **Department of Philosophy, University of Haifa, 2003**, “The Morality of Assassination: A reply to Gross”, Political Studies (2003) vol. 51. pp. 775-779, Ebsco)

Third, while assassination does involve some moral risk, it also has a chance of achieving better results from a moral point of view. Think of a battle in a conventional war against an enemy unit. Assume it can be won either

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by bombing the unit from the air, killing 200 soldiers, or by having its headquarters targeted by an ‘intelligent’ missile, killing most of the commanders of the unit – say, 25 officers. If both tactics could achieve the same result, then surely the second tactic should be morally preferred. Similarly, if Bin Laden and 30 of his close partners had been targeted, that would have been far better than killing thousands of people and causing enormous damage in Afghanistan, in a war whose contribution to the cessation of world terror is far from clear.

### **ASSASSINATION MORALLY PREFERABLE TO OTHER FOREIGN POLICY TOOLS**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool, [https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\_of\_06\_07\_07\_FINALCOPY.pdf?], p. 14  
Indeed, this point forms the foundation of my central thesis, which is that not only is political assassination a potentially moral act (when used in circumstances when the only option is recourse to violence), but that it is a preferable form of violence to any other. Stated more simply, assassination is far more moral a means of obtaining international political goals in the face of an enemy than the commonest alternative, war (or the threat thereof). Assassination is far less costly than war in terms of money, resources, and most importantly, human welfare and lives. Thus, it is far more moral than trade sanctions or war, commonly preferred alternatives.

### **ASSASSINATION IS ALWAYS THE PREFERRED FORM OF POLITICAL VIOLENCE**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool, [https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\_of\_06\_07\_07\_FINALCOPY.pdf?], p. 8  
The literature discussing the practicability of assassination involves a great number of differing perspectives on its justification and efficacy. Historically, answers to the question of whether rational-minded, democratic states should engage in political assassination range from “never,” through medieval notions of ‘*jus ad bellum*’ (an appeal to engaging in any tactic during a war, so long as the aim is just) to the more Machiavellian ‘always.’ However, most contemporary debate frames possible answers as lying in the spectrum between ‘never’ and ‘only as a last resort.’ That is, in those exceptional situations where democratic states feel that the use of violence, always a last resort for them, is necessary, assassination is always considered a last, desperate choice, usable only when all other alternatives have been exhausted. I would like to take issue with this viewpoint because it appears to me that assassination is in nearly all circumstances quite a superior choice to other forms of political violence. Moreover, I suggest that a closer examination of the phenomenon of political assassination itself, together with the arguments regarding its moral justification and its historical record of effectiveness, lead to this conclusion. I do not seek to give democratic states carte blanche to employ violence or assassination willy-nilly, but rather I concur with the standard democratic value that violence is always a least desirable alternative. However, when violence cannot be avoided, assassination should be the first form of violence considered by responsible democratic states, and not the last.

### **MORALITY REQUIRES CHOOSING THE POLICIES WHICH RESULT IN THE LEAST AMOUNT OF VIOLENCE AND CASUALTIES**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool, [https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\_of\_06\_07\_07\_FINALCOPY.pdf?], p. 9-10  
Driven by political exigency, democratic states do undoubtedly engage in acts of violence that amount to murder, often in the form of large-scale human deaths. Though resistant to entering wars, as exemplified by the United States’ late entry into both World Wars, or perhaps by Britain’s and France’s ‘appeasement’ of Hitler’s Germany, democratic states nonetheless do fight armed conflicts, just like other states. They also resort to smaller forms of violence, such as unofficial wars, ‘police actions’, and ‘peacekeeping missions,’ in which the levels of threatened and actual violence are lower than in full-scale wars. There are also forms of violence which are not conventionally thought of as such, but which nonetheless produce a significant loss of human life, such as economic sanctions. This policy is a frequent favorite of democracies, especially the United States. It seems quite strange, however, that democratic states would prefer this mode of violence to others. Karl Mueller and John Mueller note this problem, saying “the irony is that in contrast to the others, this device -- economic sanctions -- is deployed frequently, by large states rather than small ones, and may have contributed to more deaths during the post-Cold War era than all weapons of mass destruction throughout history.” Thus if violence is at times necessary, it is clear that the question of how democratic states can achieve their goals while minimizing bloodshed should be seriously considered from a moral viewpoint.

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### **ASSASSINATION IS THE BEST WAY TO ACCOMPLISH FOREIGN POLICY GOALS WITH THE LEAST AMOUNT OF CASUALTIES**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 39

For democracies, assassination is certainly more efficient at obtaining their political aims in comparison with war. Warfare requires huge expenditures in manpower, lives, opportunity costs, economic productivity, and often is devastating to its infrastructure. In short, war is needlessly costly and destructive. Assassination is a model that can better handle the aims of war, while simultaneously providing far less collateral damage. Even if an assassination policy were to fail, relatively few resources have been expended in the effort, and there is little in the way of international ramifications. Victory is the ultimate object of war, and no lengthy military operation, no matter how elegant or overwhelming, is as effective as a well-planned assassination. As Sun Tzu declared, “to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.” Assassination is the minimal and best way to accomplish this.

### **ASSASSINATION MOST MORAL WAY TO EMPLOY VIOLENCE**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 41

Realpolitik cynically suggests that the only truly effective way of carrying out a policy change is via violence. If the mere threat of force is insufficient, an assassination is the most moral way to cross the boundary and actually employ it. Both the moral and the pragmatic aspects of assassination render it far more justifiable than warfare, and in any situations in which warfare is justified as well as efficient, a fortiori an equivalent policy of assassination should be practiced.

### **ASSASSINATIONS MOST MORAL FORM OF STATE USE OF VIOLENCE**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 43

“With the demise of the Cold War, virtually all the major problems that afflicted great power relations over the last half-century have been resolved.” A new class of threats has arisen in their stead, in the form of ‘rogue states’ and terrorists who threaten to drown the world in chaotic and subversive violence. Faced with this difficulty, democracies require a new expedient in order to effectively maintain security. Political assassination is a powerful tool for democracies because it is the most responsible method for a modern state to employ violence. Assassinations are highly moral because they per se minimize the destruction done to human welfare and lives; they are unbloody, and cause little in the way of collateral damage. As well, assassinations are highly efficient, because they are inexpensive in contrast to policing actions or formal wars, and have fewer negative international repercussions. Most importantly, assassinations are political violence which has been specifically honed against the main source of opposition, and have been shown to be effective in creating policy changes. They are especially useful against terrorists and antagonistic totalitarian leaders, with whom there is little or no alternative of diplomacy, negotiation, or other non-violent act.

### **TARGETED KILLING INCREASE WILL TRADE OFF WITH FULL-SCALE MILITARY CONFLICT**

Kenneth Anderson, **Law Professor, American University-Washington College of Law, 2009**,

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 354-5

None of this alters the equally impeccable strategic logic underlying the use of law enforcement mechanisms in some circumstances. Nor does it alter the logic behind other forms of intelligence activities, such as surveillance or financial interdiction or even the use of open, full-on war. The United States can by no means rule out toppling a regime in pursuit of counterterrorism goals during the next ten or twelve years. But these are not disjunctive policies. Targeted killing is likely to increase as a policy preference as full-scale wars decrease in number and intensity and become less desirable as a means of effectuating counterterrorist objectives. Bush’s Iraq adventure has surely reduced the US appetite for invading the tribal regions of Pakistan, for example, and something has to fill the gap. That need is in part what has augmented the Predator’s appeal, especially to the Obama administration. No doubt there will be political pushback—claims that the effect of the Predator campaigns in Pakistan are backfiring by mobilizing Pakistani anger over civilian casualties, for example. But given the political unreliability and military ineffectiveness of the Pakistani arm and its preference for artillery barrages over focused counterinsurgency operations, those arguments are not likely to persuade.

## **REJECTING TARGETED KILLING LEAVES US WITH WAR OR CAPITULATION AS ALTERNATIVES**

**Kenneth Anderson, Law Professor, American University-Washington College of Law, 2009,**

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 355-6

This category of force is now an obvious means by which to confront non-state transnational terrorists outside the territorial United States. The United States is no longer in the Cold War. But the legal and political regimes that it (and other states, both friend and foe) elaborated through state practice, allowing uses of covert and discrete force as a matter of self-defense, are, if anything, more relevant in confronting transnational terrorism today. Yet as matters now stand, great pressures will be brought to bear against the very existence of this legal and political category – great precisely because they are idealistic and morally well-intended. Should those pressures prevail, they will bind the hands of the president and Congress, preventing them from taking what is paradoxically the most discrete and most precisely targeted lethal measure available against terrorists. The result would be to throw the United States into the much more difficult policy dilemma of using larger-scale military activity against terrorists or taking no very meaningful action at all.

## **Morally Justified: Intention to Reduce Overall Violence Level Makes Targeted Killing Moral**

### **TARGETED KILLING OF TYRANTS AND TERRORISTS MORAL – BECAUSE THE INTENTION IS TO REDUCE OVERALL VIOLENCE LEVEL**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 21  
Similarly, political scientists and historians have noted that the intentions of assassinating state leaders can be moral, as in the case of tyrannicide. But they concede that often political assassinations have been conducted with less than just intentions. As such, people frequently assassinate prominent politicians not so much to “derail a political programme or punish a political opponent, as to capitalise on the celebrity status of the victim.” This would make such an assassination immoral, because just intention is not being shown. However, this is a primary reason that terrorists assassinate, and tyrants will do so in order to secure more power, as was in the case of Stalin’s frequent purges of the communist party membership.

In short, tyrannicide and the targeted killing of terrorists are highly moral, because the right intention is shown through such assassination policies promoting the greater overall good by preventing future acts of illegal and generally overly destructive violence. While democracies famously deny that the end justifies the means, if war is held to be a moral means of preventing future violence, then assassination, which is less destructive by several orders of magnitude, is certainly a more justifiable action.

### **EXTRA-JUDICIAL KILLINGS ONLY WAY TO ACHIEVE JUSTICE FOR TERRORISM**

Major Matthew J. Machon, **US Army, 2006**, Targeted Killing as an Element of US Foreign Policy in the War on Terror, [[www.fas.org/irp/eprint/machon.pdf](http://www.fas.org/irp/eprint/machon.pdf)], p. 54

Given the inadequacies of the international law demonstrated in the second chapter, what recourse is available to nations that are victims of trans-national terrorism? According to Professor Beres:

“our world legal order lacks an international criminal court with jurisdiction over individuals. Only the courts of individual countries can provide the judicial context for trials of terrorists. It follows that where nations harbor such criminals and refuse to honor extradition requests, the only decent remedies for justice available to victim societies may lie in unilateral enforcement action. Here, extra-judicial execution may be essential to justice.”

### **TARGETED KILLING MORAL—PREVENTS TERRORISM THAT KILLS MORE PEOPLE**

Vincent –Joel Proulx, **JD Candidate-McGill University Institute of Comparative Law, 2005**, “If the Hat Fits, Wear it, If the Turban Fits, Run for Your Life,” *Hastings Law Journal*, 56 *Hastings L.J.* 801, p. 876

From the foregoing considerations, it is clear that the driving force behind these arguments is prevention. Traditionally, the main arguments militating in favor of an acceptable policy of assassination of terrorists were summarized as follows:

Assassination may preclude greater evil ... produces fewer casualties than retaliation with conventional weapons ... would be aimed at the persons directly responsible for terrorist attacks ... Assassination of terrorist leaders would disrupt terrorist groups more than any other form of attack; and ... leaves no prisoners to become causes for further terrorist attacks.

## **Targeted Killing Effective at Preventing Terrorist Attacks**

### **TARGETED KILLING EFFECTIVE AT DISMANTLING TERRORIST NETWORKS**

Daniel Statman, **Professor of Philosophy-University of Haifa, 2003**, “The Morality of Assassination: A reply to Gross”, *Political Studies* (2003) vol. 51. pp. 775-779, Ebsco)

First, in the war against terror, just like in the war against the mafia, what counts are the long-term results, not the immediate ones. In the short run, killing terrorists might be followed by acts of revenge, but, in the long run, there is good reason to think that such killing will weaken the terror organizations, cause demoralization among their members, limit their movements, etc. The personal charisma or professional skills of some individuals are crucial to the success of the organizations they lead, and this is especially true with terror organizations that operate underground and with no clear institutional structure. It is reasonable to assume that killing such individuals will gradually make it harder for the terror machinery to operate.

### **TARGETED KILLING FILLS A VOID LEFT FROM THE INADEQUACIES OF MILITARY, LAW ENFORCEMENT AND INTELLIGENCE STRATEGIES**

Kenneth Anderson, **Law Professor, American University-Washington College of Law, 2009**,

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 352-3

There is a fundamental strategic and moral rationale behind both the policy trend toward targeted killing and toward the use of robotic and standoff platforms such as the drone Predator as the preferred means of effectuating it. The United States has found the limits of how extensively it can wage full-scale wars with its military; even if it wanted to take on more wars, it has logistical and political limits. In addition, the United States has discovered that full-on war is useful principally against *regimes*. Full-scale, large-scale warfare of the kind waged in Afghanistan and Iraq is useful primarily for bringing down a government that, for example, might harbor or support terrorists or might be believed to be willing to supply terrorists with material to create weapons of mass destruction. While this tool has a crucial strategic place in national counterterrorism policy, by its nature, it pertains to states and state-like groups. Large-scale military operations are less useful against transnational terrorists, who are few in number, dispersed across populations and often borders, disinclined to fight direct battles, and more efficiently targeted through narrower means. The fundamental role of overt warfare in counterterrorism is to eliminate the regimes that provide safe haven to terrorist groups. Terrorist groups themselves can be strategically understood as an extreme version of a guerilla organization engaged in a strategy of logistical raiding – in which civilian morale and the resulting manipulation of political will is the logistical target. Logistical raiders typically need a safe base to which to retreat, and full-scale war is most useful in eliminating such safe bases and convincing other regimes not to provide them. But it is not usually an efficient way of going directly after the transnational terrorist groups themselves.

Law enforcement applied outside the United States, on the other hand, has also discovered its outer limits. Many debates are still to be had over the rights of alleged terrorists once in US custody, but whatever they are, few would argue that going out to “arrest” terrorists in, for example, Pakistan’s tribal zones is a winning policy or a serious option. The same is true of Somalia and other places, and it will be true of other places in the world in the future.

Moreover, the political costs for any US administration in taking and holding detainees are now enormous. Once in custody, detainees are likely to be eventually accorded quasi-constitutional protections by the courts in some matters and to receive at least some version of habeas corpus. Politically, the most powerful institutional incentive today is to kill rather than capture terrorists. The intelligence losses of killing people, rather than capturing and interrogating them, are great. But since the US political and legal situation has made aggressive interrogation a questionable activity anyway, there is less reason to seek to capture rather than kill. And if one intends to kill, the incentive today is to do so from a standoff position, because it avoids potentially messy question of surrender.

All of this speaks to the advantage to the US government of targeted killing of terrorists or persons seriously believed to be terrorists, and it also speaks to the advantages to the government of using standoff robotics technology to perform the attacks. But the humanitarian advantage of targeted killing also are enormously important, and they ought to be on the table. That is especially so given that targeted killing has come in for a barrage of criticism, legal and ethical, much of which seems perversely motivated by the fact that it can be more discriminate than full-scale military assault. The fear seems to be that targeted killing using Predators and other robotics systems “lowers the threshold for violence.” It makes violence too easy to undertake.”

### **ADOPTION OF TARGETED KILLING POLICIES BY DEMOCRACIES IS AN EFFECTIVE WAY TO DETER TYRANNY AND TERRORISM**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, *Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool*,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 10-1  
For the purpose of this essay I shall assume that political leaders have a high impact on the policies of their states or organizations, because those with less political power necessarily have less of a direct influence on these policies, and answer to their superiors. As



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well, the zeitgeist has passed in which leaders can be insulated from political violence and not held morally responsible for the actions of their states. If political leaders are able to engage in violence which directly affects the lives of hundreds of thousands or millions of their constituents, then they are not only highly influential actors, but also may be held accountable for such violence. It follows then that the targeted killing of hostile foreign leaders is a highly salient way in which democratic states can strongly affect the policies of their victim states, even if they cannot easily direct the courses taken by successive leaders. Outside of assassinating a particularly antagonistic leader, changing an enemy state's policies could be otherwise difficult or impossible to achieve. A well-developed assassination policy may not even require frequent acts of assassination; the mere threat of a targeted killing overhanging a leader may have the desired effect of projecting power to other nations without a need to actively exert it. State leaders will become mindful of their own targetability, and will tend to behave less aggressively and violently towards democracies. This subtle form of coercion can in principle be accomplished with much less financial and human cost than war involves. Thus, were powerful democracies to use assassination as a policy tool, there would be fewer tyrants, warmongers, and terrorists within the international community. Even if violence is sometimes regrettably necessary for democracies to engage in, then it is clear that the question of assassination should be taken seriously from the perspective of efficiency.

**DRONES THE ONLY EFFECTIVE STRATEGY TO TAKE OUT TERRORISTS**

Kenneth Anderson, Law and Professor of Law at American University, 2010, "Predators over Pakistan," The Weekly Standard Vol. 15, No. 24, 3/8/10, accessed 6/25/10, <http://www.weeklystandard.com/print/articles/predators-over-pakistan>)

Targeting terrorists and militants with Predator drone strikes is one campaign promise President Obama has kept to the letter.

Missiles fired from remote-piloted "unmanned aerial vehicles" (UAVs) at al Qaeda and Taliban leadership steadily and sharply increased over the course of 2009. Senior U.S. military and intelligence officials have called them one of the most effective tactics available to strike directly at al Qaeda and the Taliban. Indeed, CIA director Leon Panetta says that drones are "the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership." There is every reason to believe him.

In January 2010 alone, a dozen strikes were launched just in the Pakistani tribal region of Waziristan. With the beginning of the promised offensive against the Taliban in Afghanistan, Predator attacks have likewise surged against targets in Pakistan, concurrent with moves by Pakistani intelligence to detain Taliban leaders, and also concurrent with the extensive use of UAVs on the battlefield in the Afghan offensive (primarily as an urban surveillance tool but also for missile strikes). Obama promised that his administration would go after al Qaeda and Taliban in their refuges in Pakistan—with or without the permission of the Pakistani government, he pointedly said—and so he has done.

The aggressive expansion of the Predator targeted killing program is the Obama administration's one unambiguous innovation in the war against terrorists. The adaptation of UAV surveillance craft into missile platforms took place as an improvisation in 2002 under the Bush administration—but its embrace as the centerpiece of U.S. counterterrorism operations belongs to Obama. It is not the whole of it—the Obama administration has expanded joint operations with Pakistan and Yemen, and launched commando operations in Somalia against terrorists. But of all the ways it has undertaken to strike directly against terrorists, this administration owns the Predator drone strategy. It argued for it, expanded it, and used it, in the words of the president's State of the Union address, to "take the fight to al Qaeda."

As al Qaeda, its affiliates, and other transnational jihadists seek shelter in lightly governed places such as Yemen or Somalia, the Obama administration says the United States will follow them and deny them safe haven. Speaking at West Point, the president obliquely referred to so-called targeted killings—we will have to be "nimble and precise" in the use of military power, he said, adding that "high-ranking al Qaeda and Taliban leaders have been killed, and we have stepped up the pressure on al Qaeda worldwide."

The Predator drone strategy is a rare example of something that has gone really, really well for the Obama administration. Counterterrorism "on offense" has done better, ironically, under an administration that hoped it could just play counterterrorism on defense—wind down wars, wish away the threat as a bad dream from the Bush years, hope the whole business would fade away so it could focus on health care. Yet for all that, the Obama administration, through Predator strikes, is taking the fight to the enemy.

And, let's face it, in dealing with terrorist groups in ungoverned places in the world, we have few good options besides UAVs. Drones permit the United States to go directly after terrorists, rather than having to fight through whole countries to reach them. Maybe that's not enough to win. Maybe "light-footprint" counterterrorism via drones turns out to be just the latest chimera in the perennial effort to find a way to win a war through strategic airpower. Yet even in a serious counterinsurgency on the ground, drones will still be important as a means of attacking terrorists while clearing and holding territory. The upshot? As long as we engage in counterterrorism, drones will be a critical part of our offense.

## **AT: “Targeted Killing no Different from Terrorism”**

### **ASSASSINATION IS DISTINCT FROM TERRORISM**

Abraham Kanter, **Ohio State University-Honors Thesis, 2007**, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool, [https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\_of\_06\_07\_07\_FINALCOPY.pdf?], p. 20-1 Another criticism of assassination involves parallels drawn between policies of assassination and terrorism. This analogy attempts to show that democratic assassination can never have proper intention, just as terrorists’ strategy of indiscriminate killing belies their purported aim of seeking to end unjust violence. When terrorists kill, it is not just the fact that they are engaging in violence that is immoral, but their methodology is in error as well. They explicitly target noncombatants, people who are not actively engaging in violent policies for which violence would be an appropriate response. Their victims are often weak and unarmed, and do not have the will, or the capacity, to fight back. Additionally, terrorism is unjust because it seeks to engage in violence qua violence, in order to completely undermine the functionality of their target population. There is nothing rational that their victims can do that permits them to change their status of being targeted by terrorists. For example, Hamas is committed to the complete and utter destruction of the state of Israel and its population, whereas when violence is used legitimately the purpose is not the pursuit of violence itself; rather, aim is to create a realistic policy change. When democratic states engage in violence, they do so only as a last resort; their purpose is not to create a perpetual system of fear. In the case of the Persian Gulf War in 1990-91, the United States-led coalition would have ended hostilities had Saddam Hussein withdrawn from Kuwait, whose sovereignty he violated by annexation. As well, surrenders are accepted. A feasible policy of assassination requires that an antagonistic leader is targeted not because of who he is, but because of what he does, that is, on account of the violence he perpetrates.

### **DEADLY FORCE AGAINST ENEMY COMBATANTS NOT TERRORISM**

A. James Gregor, **Political Science Professor-Berkeley, 1982**, The Morality of Terrorism: Religious and Secular Justifications, ed. D. Rapoport & Y. Alexander, p. 156  
According to his account, Panunzio would not characterize the public and often brutal execution of criminals in time of peace as terroristic even if at least part of the intention was to deter such acts, that is, even if such public executions were employed to instill fear and anxiety among the general population. The criminal, in such an instance, although helpless, was not an innocent. He was (presumably) guilty of a crime. (The circumstances provided for establishing that guilt is a separate issue.) Similarly, the use of deadly force, no matter how brutal, against enemy soldiers in time of war, is not terroristic because soldiers are not innocents. The sworn duty of a combatant involves the use of deadly force against us. Moreover, the combatant can abandon his purpose by surrender, and then, once helpless, is accorded whatever protection the rules of war provide.

### **TERRORISTIC VIOLENCE DISTINCT – INTENTIONALLY TARGETS INNOCENTS**

A. James Gregor, **Political Science Professor-Berkeley, 1982**, The Morality of Terrorism: Religious and Secular Justifications, ed. D. Rapoport & Y. Alexander, p. 158  
What Marighella clearly advocated was terrorism: the use of severe sanction or deadly force against innocents for the express proximate purpose of bending others to his will. Given this strategy, terroristic bands commit themselves to the indiscriminate bombing of public buildings, the random downing of civilian aircraft in transit, the kidnapping of innocents to serve as hostages or examples. The difference between Mussolini’s Fascists and terrorists is that while Fascists may have undertaken such acts, those acts were understood, by their own standards, as prima facie criminal. For terrorists such a distinction does not obtain. Thus Franz Fanon could advocate the murder of any “colonialist,” presumably man, woman, or child, in order to restore the impaired self-esteem of an oppressed colonial: deadly force exercised against an unarmed innocent for proximate purpose. The distinction between Fascist acts of violence and a strategy of terror seems reasonably clear. The members of the Socialist League, the Chambers of Labor, or the Socialist and Communist Parties in Northern Italy during the wave of Fascist violence in the biennial 1921-22 could avoid violence by abandoning the Leagues, the Chambers, and the infrastructural institutions of Socialism and Communism. Their compliance with Fascist demands could make them reasonably confident that their immediate security was assured. Their “guilt” was a function of their voluntary behavior. They had chosen to behave in a proscribed manner. Their rehabilitation would turn on a specific schedule of compliance behaviors. Similarly, their “innocence” would have been the consequence of a voluntary avoidance of prohibited conduct. In effect, fascists were prepared to operationalize “guilt” and “innocence” by providing a guide to prescribed conduct. In effect, “guilt” and “innocence” involved some determinate voluntary acts on the part of the individual or individuals.  
Thus, the threat of violence might intimidate in order to bend a “guilty” individual, or individuals, to our will – when that individual or individuals are aware of what specific behaviors will reduce the threat of injury or loss. Terrorism, on the other hand, does not intimidate its victims because it offers them no escape from deadly coercion or loss. There is no schedule of behaviors to which the prospective victim might

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conform. The victim is an “innocent” – he has neither done anything proscribed nor can he undertake compliance behaviors to avoid threat.

In the course of political revolution, one may intimidate those whose behaviors one wishes to modify. **Terror**, on the other hand, is not employed to alter the conduct of its victims. It is employed to influence others. Innocents are used as means to proximate ends.

### **TERRORISM DISTINCT BECAUSE IT INTENTIONALLY TARGETS INNOCENTS**

A. James **Gregor, Political Science Professor-Berkeley, 1982**, The Morality of Terrorism: Religious and Secular Justifications, ed. D. Rapoport & Y. Alexander, p. 159

The circumstances are entirely different in the case of terror. In such cases, there is no voluntary behavior that makes the individual the proper object of terror. Any individual or individuals, irrespective of anything they may or may not choose not to do, can become the objects of terror. Nor is there any compliance behavior that would reduce the probability of their falling victim to terror. The object of terroristic violence is not a select and proper object. Terroristic violence has as its purpose not coercive sanction directed against culpable parties, but some proximate end. Instrumental terror is employed to impair the functioning of some system or institution. Demonstrative terror is used to bend entire populations to the purpose of others. Prophylactic terror is employed in anticipation of resistance or rebellion. Incidental terror involves those criminal acts – assaults, armed robbery, kidnapping, and so on – that impact upon innocent victims in the service of the perpetrator’s pathology, profit, or advantage.

One of the most salient traits of terrorism is its indiscriminate and arbitrary character, in the sense that there is no piece of voluntary behavior that would increase or decrease the probability of finding oneself the object of terror. Terrorist acts are like natural catastrophe – they strike anyone, the guilty and the innocent alike. There are few precautions that one might take to avoid becoming the object of terror. Its onset is incalculable, and its termination unpredictable for those who are its victims.

## **AT: “Targeted Killing Ineffective and Counterproductive”**

### **TARGETED KILL POLICY IN PAKISTAN MOST EFFECTIVE COUNTERTERRORISM POLICY DESPITE RISK OF ANTI-AMERICAN BACKLASH**

Kenneth Anderson, Law Professor, American University-Washington College of Law, 2009,

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 352

This view is deeply embedded within the mainstream of President Obama’s party. To cite only one example, note how unambiguously the Democratic international relations and intelligence *eminence grises* Graham Allison and John Deutch endorsed the Predator policy with regard to Pakistan:

“The counterterrorism strategy [of predator strikes] in Pakistan that has emerged since last summer offers our best hope for regional stability and success in dealing a decisive blow against Al Qaeda and what vice President Joe Biden calls ‘incorrigible’ Taliban adherents. But implementing these operations requires light US footprints *backed by drones and other technology that allows missile attacks on identified targets* [emphasis added].

In Response to the increasingly heard claim that the strategy of using drones and missiles for targeted killing backfires by inflaming Pakistani public opinion against the United States because of collateral civilian deaths, Allison and Deutch offer a remarkably realpolitik answer. If “many Pakistanis see covert actions carried out inside their country as America ‘invading an ally’” the problem is not the drone campaign, they write; it is, rather, merely that “the US government no longer seems capable of conducting covert operations without having them reported in the press” [emphasis added].

### **FAILED AND COUNTERPRODUCTIVE WARS MUCH WORSE THAN COUNTERPRODUCTIVE ASSASSINATION ATTEMPTS**

Abraham Kanter, Ohio State University-Honors Thesis, 2007, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool,

[[https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy\\_of\\_06\\_07\\_07\\_FINALCOPY.pdf?](https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?)], p. 38-9

Despite a rather abundant record of failed American assassination attempts, none has been as pragmatically counter-productive as failed military conflicts, such as the Korean War, fought to a stand-still, and which has led to the brutal oppression of millions of North Koreans and also threatened world security through Kim Jong-Il’s persistent attempts to obtain nuclear weapons. The Vietnam War, arguably the first true American defeat, resulted in the deaths of 50,000 Americans and over a million Vietnamese, without the attainment of any of the United States’ objectives. Moreover, it was highly counterproductive in projecting American force because it led to an American policy of isolationism while the Soviet Union expanded itself aggressively.

Notwithstanding the American victory over Saddam Hussein’s forces in 2003, current failures to subdue the insurrection in Iraq have been not been forthcoming and have certainly been counterproductive by incensing the international community, Iraq’s citizenry, and even the majority of Americans.

## **AT: “Drones Violate International Law”**

### **DRONES DO NOT VIOLATE PROHIBITION ON INDISCRIMINATE WEAPONS**

Philip Alston, **Special Rapporteur on Extrajudicial Executions, 2011**, Unmanned Aircraft Systems (Drones) and Law, p. 109

The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person. It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited. However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fire missiles. The critical legal question is the same for each weapon; whether its specific use complies with IHL.

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## **\*\*Drone Strikes Bad\*\***

## **Link: Decreased Torture Causes Shift to Drone Attacks**

**ENDING TORTURE JUST GETS REPLACED WITH A POLICY OF ASSASSINATION THROUGH DRONE STRIKES, KILLING EVEN MORE PEOPLE**

**SWANSON**, JOURNALIST & WASHINGTON DIRECTOR OF DEMOCRATS.COM, **2010** [DAVID, “IS MURDER THE NEW TORTURE?”, THE PUBLIC RECORD, APR 28<sup>TH</sup>, [HTTP://PUBRECORD.ORG/TORTURE/7380/IS-MURDER-THE-NEW-TORTURE/](http://pubrecord.org/torture/7380/is-murder-the-new-torture/)]

But there is a more serious problem, I think. Namely, murder seems to be advancing in the U.S. toolkit as a replacement for torture. Both tools, murder and torture, produce exactly the same amount of useful intelligence. Both tools scare the hell out of people abroad and at home. Both tools serve to teach a domestic audience that certain types of people are not fully people and cannot be dealt with humanely. Both tools help to advance the further stripping away of civil liberties through fear and terror. The goals of torture that the CIA has advanced for decades of eliminating a person's entire consciousness and identity, the mission of placing barbarians completely under control of the empire, what accomplishes this better than murder?

Look at all the hassle our government has been through trying to legalize and justify torture, not to mention the kidnappings and imprisonments necessary to engage in torture. We've seen CIA agents indicted in Italy and prosecutions of high level Americans opened in Spain. Former officials are facing civil suits in the United States for damages. Who needs the headaches? The Director of National Intelligence legalized the assassination of Americans abroad, and by implication any non-Americans as well, by going to Congress in February and announcing that such crimes would henceforth be legal. Easy peasey. No fuss, no muss. And if you want some future al-Libi to tell you that some future Iraq has scary scary weapons, don't torture him; announce that he manages the stockpile and then put a bullet in his head.

President Obama has ordered the murder of American citizen Anwar al-Awlaki. Like the innocent but tortured Abu Zubaydah (innocent at least of any of the crimes he was accused of), Awlaki is now the mastermind terrorist of the universe. And once he's dead, who's to say he wasn't? Who can demand a trial or access to documents? He'll be dead. See the beauty of it?

If the top mastermind is in Yemen, what the hell are we doing building a quagmire in Afghanistan? Don't ask. But notice this: we have dramatically increased the use of missile strikes to assassinate in Afghanistan and Pakistan. And we have increased the use of murderous night-time raids to such an extent that we now kill more civilians in that way than we do with drones. They're the “wrong people,” or neighbors who came to help, or family members clinging to loved ones. Sometimes they're young students with their hands tied behind their backs. Accidents will happen. But no U.S. officials' future book tours are going to be interrupted by protesters, since there's no torture involved. Civilization is on the march!

## **Impact: Targeted Killing Bad for Many Reasons**

### **TARGETED KILLING WRONG: COLLATERAL DAMAGE, UNDERMINES INCENTIVE FOR NEGOTIATED SOLUTIONS AND VIOLATES HUMAN RIGHT TO TRIAL**

Vincent –Joel Proulx, JD Candidate-McGill University Institute of Comparative Law, 2005, “If the Hat Fits, Wear it, If the Turban Fits, Run for Your Life,” Hastings Law Journal, 56 Hastings L.J. 801, p. 878

More importantly, such a policy impedes stability and peace-building, while placing collateral or by-standing civilians at significant risk: "Targeted killings shrink institutional repertoire by decreasing the stake of each side in peaceful means of dispute resolution. They also undermine inclusion, because they tend to affect not only specifically intended targets, but also civilians from the same communities who happen to be in the way." As mentioned, not only do targeted killings engender collateral damage in the form of unnecessary civilian death, but they also have a deleterious effect on democratic due process, regardless of whether terrorist organizations may be targeted with military force. By assassinating a suspected terrorist, we are in fact stripping that person of all the procedural guarantees surrounding a fair trial and usually afforded any accused under domestic criminal law or human rights law. In short, we are depriving that individual of the right to a fair trial, a cognizable and irreconcilable affront to international human rights norm. The objective here is not to weigh every possible argument for and against targeted killing, nor is to resolve the debate surrounding such a policy. Rather, my analysis purports to briefly canvass the major international legal restraints on targeted killing, in order to demonstrate that, similar to indefinite detention, this practice is morally and legally unpalatable under the current scheme of international law. Furthermore, carrying out a shoot-to-kill policy when apprehension of a given suspect is reasonably feasible would clearly violate the Fourth Amendment.

### **TARGETING DECISIONS AND STRIKES SUBJECT TO ERROR – WRONGLY IDENTIFY THREATS AND COLLATERAL DAMAGE**

Benjamin McKelvey, JD Candidate, Law Review Editor, 2011, “Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, 44 Vand. J. Transnat’l L. 1353, p. 1375

Currently, there is no specific evidence that the targeted killing program has been used for illegitimate purposes other than national defense and security. However, the Executive's exercise of authority in identifying and pursuing threats of terror has produced a worrisome error rate. According to an analysis of Predator drone strikes in Pakistan conducted by the New America Foundation, since 2004, the non-militant fatality rate has been roughly 20 percent. In other words, about one-fifth of those killed by Predator drone strikes have been non-military targets, including innocent civilians. In June of 2010, it was reported that the government lost nearly 75 percent of the cases involving habeas petitions filed by detainees at Guantanamo Bay. This suggests that for the majority of detained enemy combatants, the government has had insufficient evidence for the assertion that the detained individuals were involved in hostilities against the United States. The rate of error in these instances only adds to the concern over the procedural guarantees of the targeted killing process and the need for a more standardized process with a robust system of screening and oversight.



## **Impact: Drone Attacks Are a Form of Population Torture**

AND THIS TURNS CASE – DRONE WARFARE IS TORTURE WRIT LARGE THAT TERRORIZES ENTIRE POPULATIONS

GROVE, PHD CANDIDATE JOHNS HOPKINS, **2010** [JAIRUS, “NEW WARS, NEW WARRIORS”, MAR 16TH, [HTTP://CONTEMPORARYCONDITION.BLOGSPOT.COM/2010/02/NEW-WARS-NEW-WARRIORS.HTML](http://contemporarycondition.blogspot.com/2010/02/new-wars-new-warriors.html)]

This, of course, has nothing to do with the atom bomb per se. Airpower, cruise missiles, the "Prompt Global Strike" initiative, can all accomplish this task without a nuclear warhead. What keeps me up at night is not the magnitude of the weapons but the event without warning that strikes like a lightning bolt. More to the point it is the inequality and the regularity of the inequality with which these weapons strike such that only a few populations in the world truly live with the daily dread that they or their loved ones could be next. I don't believe for one second that this is the tragic inevitability of war. Nor do I believe that this is just some flaw in the mortal condition. Death from above is different than someone kicking in your door or invading your city. There is no countermeasure, no response, no resistance, no possibility for combat. If the bomb arrives there is only what I imagine is a few seconds of shock, sadness and then maybe even relief that you do not have to bear another day of waiting to be visited by the bomb. This is all a long way of saying that, for me, the debate over continuing the war in Afghanistan elides a question much more troubling that is not even being asked on the major news networks, much less openly by the Obama administration: Will we continue to send drones to shoot 'Hellfire' missiles into villages between Afghanistan and Pakistan and beyond? Will more or less troops even have any bearing on the decision to increasingly automate the war? So far there seems to have only been a steady increase in drone attacks since the so called Afghanistan surge. Is it possible that future troop reductions in Afghanistan and Iraq will lead to an increasing reliance on this prosthetic means of warfare? For all of the changes in strategy, diplomatic posture, and real commitments to a better world in both word and deed by the Obama administration, the first drone attack took place January 23rd 2009, just a few days after Obama was inaugurated. I remember because I had just returned from the Obama Campaign's Staff Party when I read the news update on my computer. Even then in the haze of one of the best nights of my life the news made me sad. So much had changed and yet this continued unabated, seemingly without pause. Since then the attacks have become more regular. In fact the Obama administration has already authorized and ordered more Predator attacks than the Bush administration did the previous year. I have no idea what a drone sounds like. I imagine it to be like a remote control airplane. Something high-pitched, like an airplane but shriller. What I do know is that every child in the territory of Waziristan must talk about it constantly. In an area of the world in which indoor plumbing and consistent electricity would be 'the future' the boogeyman is not a vampire or some disfigured monster as it was for me growing up in the Texas suburbs. It is a polished, faceless, white UFO armed to kill and operated by remote or automated control. I am sure, in fact I know, that the statistical success of these weapons is unimpeachable. If the question is do they work than the answer is yes. If by work you mean they, in the words of the Revolution in Military Affairs, 'hit to kill'. I can't argue with the numbers. However I can't help wondering what the world will be like in ten or twenty years, not just in Waziristan, but in every country we deploy these weapons, if the United States of America becomes synonymous with this faceless, bringer of death. It will not be those maimed or killed that all Americans will have to answer to but the millions that couldn't sleep, that woke up drenched in sweat, or simply wanted to die because they could not stand the waiting. What must it be like to start every day wondering if you are next. If the plane you hear in the distance, the buzz you thought you heard, the unholy dread of a sudden stillness, the oppressive weight of silence, is the arrival of precision American engineering. War is hell. This is slow sadistic torture. Every flash in the sky, the low hum of an engine, the constant sense of unease, all of it is a waiting game that would make me wish for hell's certainty and finality. This cannot be the best we can do.

## **Impact: Drone Attacks Immoral**

### **TARGETED KILLINGS INEVITABLY WILL KILL INNOCENTS -- IMMORAL**

**Byman 2006** [Daniel Byman, Byman is a Brookings Institute expert on counterterrorism and Middle Eastern Security He also directs Georgetown University's Center for Peace and Security Studies, "Do Targeted Killings Work?", March/April 2006, <http://www.foreignaffairs.com/articles/61513/daniel-byman/do-targeted-killings-work>

Critics also level an even more damning moral charge: that the attacks inevitably lead to the death of innocents. Bouchiki was one such victim, and as the Shehada attack showed, even the most carefully planned strike—and one that actually accomplishes its goal—can produce a great deal of collateral damage. The costs of such mistakes go beyond the loss of lives and can call into question the legitimacy of the entire counterterrorism campaign. If terrorism is condemned because it kills the innocent, how can one justify counterterrorism tactics that kill them too?

### **TARGETED KILLINGS USUALLY TAKE OUT ENTIRE FAMILIES AND NEIGHBORHOODS – MORALLY UNACCEPTABLE**

**Sperotto 3/17/10** Federico, Open Security, "Illegal and ineffective? Drone strikes and targeted killing in 'the war on terror'" <http://www.opendemocracy.net/opensecurity/federico-sperotto/illegal-and-ineffective-drone-strikes-and-targeted-killing-in-war-on>

Due to those numerous constraints, to engage in targeted killing outside an armed conflict often equates to murder. Outside of warfare and the confines of military necessity, a strike would be a violation of the right to life of the targeted individual, and consequently an arbitrary killing. Chronicles report a significant aerial campaign, devoted to tracking and killing terrorist operatives, along the permeable frontier between Afghanistan and Pakistan, and in the federally administered tribal areas of Pakistan. Those in favour of the employment of precision weapons to kill named enemy fighters recovering far from the battlefield focus on the value of the target, considered a public enemy whose killing is indispensable, while little attention is placed on his/her human rights. Worse, the rights of his/her relatives are not considered at all. In northwest Pakistan, society has a tribal structure and families are extended. People live concentrated in hamlets and compounds. Predators and Reapers are precision weapons platforms, but the radius of the blast of a Hellfire missile always includes those who are relatively close to the target, and the hit is capable of destroying an entire neighbourhood. A strike against a tribal leader normally kills his entire family. This is unacceptable under the law of human rights. It is true that often, a warlord rests and recovers with his lieutenants and this circumstance increases the value of the target. However, troops are not allowed to engage an individual on the mere suspicion of his being a potential or actual unlawful combatant.

### **ILLEGALITY OF TARGETED KILLING PROVES IT IS IMMORAL**

**Vincent –Joel Proulx, JD Candidate-McGill University Institute of Comparative Law, 2005**, "If the Hat Fits, Wear it, If the Turban Fits, Run for Your Life," *Hastings Law Journal*, 56 *Hastings L.J.* 801, p. 878-9

Belonging primarily to the armed conflict paradigm, the policy of targeted killing engenders a myriad of moral dilemmas in the war on terror. The focal point is easily decipherable: to what extent is the targeted killing of suspected terrorists justifiable under international law? Although an analysis of the legality of this practice will ineluctably require the international community to engage in profound moral introspection, targeted killing, like indefinite detention, does not exist in a legal vacuum. In fact, international law is sufficiently defined and circumscribed to condemn such a policy. The primary reason behind the illegality of such practice lies in the very purpose underlying the laws of war and international humanitarian law: the protection of innocent civilians. Furthermore, the distinction between combatants and non-combatants, including unprivileged belligerents, will undoubtedly inform the analysis.

## **Impact: Drone Attacks Increase War Risk**

### **DETACHMENT FROM “REAL” VIOLENCE AFFORDED BY DRONES, MAKES WAR MORE LIKELY**

**Kenneth Anderson, Law Professor, American University-Washington College of Law, 2009,**

Legislating the War on Terror: an agenda for reform, eds. B. Wittes, p. 353

The same criticism is offered of evolving robotic technology that increasingly allows a party to target its use of force without having to risk its own personnel. Not using its own personnel allows the party to attack without the fear of counterassault, which might increase the need to use greater amounts of force and cause greater collateral damage. But it also, it is sometimes argued, reduces the inhibitions on the decision to use force. For example, P.W. Singer, a theorist of military technology, says of robotic unmanned weapons systems: “When faced with a dispute or crisis, policymakers have typically regarded the use of force as the “option of last resort.” Unmanned systems might now help that option move up the list, with each upward step making war more likely.”

### **DRONES MAKE WAR MORE ACCEPTABLE – SEEN AS COSTLESS**

**Singer 2009** [Peter Warren Singer, senior fellow at the Brookings institution, “Robots at War: The New Battlefield”; Winter; <http://www.wilsonquarterly.com/article.cfm?aid=1313>]

Lawrence J. Korb is one of the deans of Washington’s defense policy establishment. A former Navy flight officer, he served as assistant secretary of defense during the Reagan administration. Now he is a senior fellow at the Center for American Progress, a left-leaning think tank. Korb has seen presidential administrations, and their wars, come and go. And, as the author of 20 books and more than 100 articles, and a veteran of more than a thousand TV news-show appearances, he has also helped shape how the American news media and public understand these wars. In 2007, I asked him what he thought was the most important overlooked issue in Washington defense circles. He answered, “Robotics and all this unmanned stuff. What are the effects? Will it make war more likely?” Korb is a great supporter of unmanned systems for a simple reason: “They save lives.” But he worries about their effect on the perceptions and psychologies of war, not merely among foreign publics and media, but also at home. As more and more unmanned systems are used, he sees change occurring in two ways, both of which he fears will make war more likely. Robotics “will further disconnect the military from society. People are more likely to support the use of force as long as they view it as costless.” Even more worrisome, a new kind of voyeurism enabled by the emerging technologies will make the public more susceptible to attempts to sell the ease of a potential war. “There will be more marketing of wars. More ‘shock and awe’ talk to defray discussion of the costs.” Korb is equally troubled by the effect that such technologies will have on how political leaders look at war and its costs. “It will make people think, ‘Gee, warfare is easy.’ Remember all the claims of a ‘cakewalk’ in Iraq and how the Afghan model would apply? The whole idea that all it took to win a war was ‘three men and a satellite phone’? Well, their thinking is that if they can get the Army to be as technologically dominant as the other services, we’ll solve these problems.” Korb believes that political Washington has been “chastened by Iraq.” But he worries about the next generation of policymakers. Technologies such as unmanned systems can be seductive, feeding overconfidence that can lead nations into wars for which they aren’t ready. “Leaders without experience tend to forget about the other side, that it can adapt. They tend to think of the other side as static and fall into a technology trap.” “We’ll have more Kosovos and less Iraqs,” is how Korb sums up where he thinks we are headed. That is, he predicts more punitive interventions such as the Kosovo strikes of 1999, launched without ground troops, and fewer operations like the invasion of Iraq. As unmanned systems become more prevalent, we’ll become more likely to use force, but also see the bar raised on anything that exposes human troops to danger. Korb envisions a future in which the United States is willing to fight, but only from afar, in which it is more willing to punish by means of war but less willing to face the costs of war. Immanuel Kant’s Perpetual Peace (1795) first expressed the idea that democracies are superior to all other forms of government because they are inherently more peaceful and less aggressive. This “democratic peace” argument (cited by presidents across the partisan spectrum from Bill Clinton to George W. Bush) is founded on the belief that democracies have a built-in connection between their foreign policy and domestic politics that other systems of government lack. When the people share a voice in any decision, including whether to go to war, they are supposed to choose more wisely than an unchecked king or potentate. Colonel R. D. Hooker Jr. is an Iraq veteran and the commander of an Army airborne brigade. As he explains, the people and their military in the field should be linked in two ways. The first is the direct stake the public has in the government’s policies. “War is much more than strategy and policy because it is visceral and personal. . . . Its victories and defeats, joys and sorrows, highs and depressions, are expressed fundamentally through a collective sense of exhilaration or despair. For the combatants, war means the prospect of death or wounds and a loss of friends and comrades that is scarcely less tragic.” Because it is their blood that will be personally invested, citizen-soldiers, as well as their fathers, mothers, uncles, and cousins who vote, combine to dissuade leaders from foreign misadventures and ill-planned aggression. The second link is supposed to come indirectly, through a democracy’s free media, which widens the impact of those investments of blood to the public at large. “Society is an intimate participant [in war] too, through the bulletins and statements of political leaders, through the lens of an omnipresent media, and in the homes of the families and the communities where they live. Here, the safe return or death in action of a loved one, magnified thousands of times, resonates powerfully and far afield,” Hooker says. The news media’s role in a free system, then, is not merely to report on a war’s outcome, as if reporting on a sporting event. The public’s perceptions of events on distant battlefields create pressures on elected leaders. Too much pressure can lead an elected leader to try to interfere in ongoing operations, as bad an idea in war as it would be in sports for the fans to call in the plays for their favorite team. But, as Korb and Hooker explain, too little public pressure may be worse. It’s the equivalent of no one even caring about the game or its outcome. War becomes the WNBA.

## COMBINATION OF DRONE TECHNOLOGY AND TARGETED KILL STRATEGY SEDUCES POLICYMAKERS AND PUBLIC INTO MORE WARS

**Singer 2009** [Peter Warren Singer is an American Political Scientist and international relations scholar, he is currently a senior fellow at the Brookings institution, where he is the director of the 21st century Defense Initiative; “Robots at War: The New Battlefield”; Winter 2009;

<http://www.wilsonquarterly.com/article.cfm?aid=1313>]

Such changed connections don't just make a public less likely to wield its veto power over its elected leaders. As Lawrence Korb observed, they also alter the calculations of the leaders themselves.

Nations often go to war because of overconfidence. This makes perfect sense; few leaders choose to start a conflict thinking they will lose. Historians have found that technology can play a big role in feeding overconfidence: New weapons and capabilities breed new perceptions, as well as misperceptions, about what might be possible in a war. Today's new technologies are particularly likely to feed overconfidence. They are perceived to help the offensive side in a war more than the defense, plus, they are improving at an exponential pace. The difference of just a few years of research and development can create vast differences in weapons' capabilities. But this can generate a sort of “use it or lose it” mentality, as even the best of technological advantages can prove fleeting (and the United States has reasons for concern, as 42 countries are now working on military robotics, from Iran and China to Belarus and Pakistan). Finally, as one roboticist explains, a vicious circle is generated. Scientists and companies often overstate the value of new technologies in order to get governments to buy them, but if leaders believe the hype, they may be more likely to feel adventurous. James Der Derian is an expert at Brown University on new modes of war. He believes that the combination of these factors means that robotics will “lower the threshold for violence.” The result is a dangerous mixture: leaders unchecked by a public veto now gone missing, combined with technologies that seem to offer spectacular results with few lives lost. It's a brew that could prove very seductive to decision makers. “If one can argue that such new technologies will offer less harm to us and them, then it is more likely that we'll reach for them early, rather than spending weeks and months slogging at diplomacy.” When faced with a dispute or crisis, policymakers have typically regarded the use of force as the “option of last resort.” Unmanned systems might now help that option move up the list, with each upward step making war more likely. That returns us to Korb's scenario of “more Kosovos, less Iraqs.” While avoiding the mistakes of Iraq certainly sounds like a positive result, the other side of the tradeoff would not be without problems. The 1990s were not the halcyon days some recall. Lowering the bar to allow for more unmanned strikes from afar would lead to an approach resembling the “cruise missile diplomacy” of that period. Such a strategy may leave fewer troops stuck on the ground, but, as shown by the strikes against Al Qaeda camps in Sudan and Afghanistan in 1998, the Kosovo war in 1999, and perhaps now the drone strikes in Pakistan, it produces military action without any true sense of a commitment, lash-outs that yield incomplete victories at best. As one U.S. Army report notes, such operations “feel good for a time, but accomplish little.” They involve the country in a problem, but do not resolve it. Even worse, Korb may be wrong, and the dynamic may yield not fewer Iraqs but more of them. It was the lure of an easy preemptive action that helped get the United States into such trouble in Iraq in the first place. As one robotics scientist says of the new technology he is building, “The military thinks that it will allow them to nip things in the bud, deal with the bad guys earlier and easier, rather than having to get into a big-ass war. But the most likely thing that will happen is that we'll be throwing a bunch of high tech against the usual urban guerillas . . . . It will stem the tide [of U.S. casualties], but it won't give us some asymmetric advantage.” Thus, robots may entail a dark irony. By appearing to lower the human costs of war, they may seduce us into more wars.

## **AT: “Drone Attacks Effectively Reduce Terrorism”**

### **TARGETED KILLINGS INCREASE ANTI-AMERICANISM, COUNTERPRODUCTIVE TO DECREASING TERRORISM**

Matthew Evangelista, Professor Government-Cornell University, 2008, Law, Ethics & The War on Terror, p. 99-100

The attack against Pakistan, and the ones against suspected al Qaeda militants in Somalia a year later, pose a further set of considerations, of a more pragmatic sort. Like torture, targeting killings can have a counterproductive effect – they lead to more terrorism rather than less. In the Israeli-Palestinian conflict, each side insists that the other's violence begets further violence, and both sides are probably right. Given how unpopular the United States is throughout the world, but especially in places like Pakistan and Somalia, US leaders might want to consider whether their actions aimed at preventing terrorism could serve as a recruiting call for new terrorists. Apart from the legality and morality of targeted killings, their effectiveness may influence the issue of whether they come to be considered acceptable state practice.

### **OPPOSITION TO US DRONE ATTACKS INCITES TERRORISM WITHIN AND AGAINST THE US -- BLOWBACK**

Gerges 2010 [Fawaz, Professor of Middle Eastern Politics and International Relations at the London School of Economics and Political Science; he earned his doctorate from Oxford, “The Truth About Drones: They are Inspiring Homegrown Terror”, May 30, 2010, <http://www.newsweek.com/2010/05/30/the-truth-about-drones.html>]

Failed Times Square bomber Faisal Shahzad says he was driven by anger over dozens of unmanned drone attacks that he witnessed during his most recent five-month visit to his home in Pakistan. That seems a plausible enough motive, particularly since he joins a growing list of homegrown U.S. terror suspects who have cited the escalation of U.S. military operations on the Afghanistan-Pakistan border in general, or in the drone attacks in particular. They include U.S. resident Najibullah Zazi, the Afghan immigrant who pleaded guilty in a plot to bomb the New York subway system; Maj. Nidal Malik Hasan, the U.S.-born army psychiatrist, charged with fatally shooting 13 people at Fort Hood, Texas, last year; and the five American Muslims from Virginia, accused of plotting attacks against targets in Pakistan and Afghanistan. So why isn't the Obama administration listening? It has so far been unable, or unwilling, to acknowledge the link between the drone attacks and the rising incidence of homegrown terror. Instead, the administration has accused the Pakistani Taliban of directing and probably financing the Times Square plot, even though Shahzad has said he went to the Taliban for help, not the other way around. Obama's top counterterrorism adviser, John Brennan, dismissed the reports that Shahzad was motivated by the drone strikes and, instead, said that the suspect was “captured by the murderous rhetoric of Al Qaeda and TTP that looks at the United States as an enemy.” The Obama team has its rationale for drone attacks. It stresses that the drone attacks have degraded the capabilities of the Pakistani Taliban and Al Qaeda, without putting U.S. troops in harm's way on Pakistani soil. What this calculus ignores is the damage drone attacks inflict on America's reputation in the Muslim world and the “possibilities of blowback,” about which the CIA, which leads the drone war, has rightly warned. The war on the AfPak border has replaced Iraq as the main source of homegrown radicalization. Qaeda's effort to find and recruit terrorists has been replaced by a bottom-up flow of volunteers, a flow that is currently very weak, and extremely difficult to track. What these individuals had in common was that they were radicalized online, typically by coverage of the AfPak battles. The most controversial element of those battles is the use of CIA Predator drones on targets in Pakistan. The CIA currently wages a 24/7 Predator campaign against the Pakistani Taliban and Al Qaeda. In Pakistan, drone attacks are Obama's weapon of choice. He has expanded the use of drones to include low-level targets, such as foot soldiers. According to an analysis of U.S. government sources, the CIA has killed around 12 times more low-level fighters than mid-to-high-level Qaeda and Taliban leaders since the drone attacks intensified in the summer of 2008. In the first four months this year, the Predators fired nearly 60 missiles in Pakistan, about the same number as in Afghanistan, the recognized war theater. In Pakistan, the pace of drone strikes has increased to two or three a week, up roughly fourfold from the Bush years. Although drone strikes have killed more than a dozen Qaeda and Taliban leaders, they have incinerated hundreds of civilians, including women and children. Predator strikes have inflamed anti-American rage among Afghans and Pakistanis, including first or second generation immigrants in the west, as well as elite members of the security services. The Pakistani Taliban and other militants are moving to exploit this anger, vowing to carry out suicide bombings in major U.S. cities. Drone attacks have become a rallying cry for Taliban militants, feeding the flow of volunteers into a small, loose network that is harder to trace even than shadowy Al Qaeda. Jeffrey Addicott, former legal adviser to Army Special Operations, says the strategy is “creating more enemies than we're killing or capturing.” The Obama administration needs to at least acknowledge the dangers of military escalation and to welcome a real debate about the costs of the drone war. Because clearly, its fallout is reaching home.

### US TARGETED KILL ATTACKS CREATE THOUSANDS OF NEW TERRORISTS

**Shah 10**, Sikander Ahmed, University of Michigan Ann Arbor; Assistant Professor of Law and Policy, LUMS University, Lahore, Pakistan, War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan)

The use of force is unnecessary in self defense when, rather than diminishing the dangers involved, the gravity of the threat posed is augmented by the use of force. U.S. drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensely strengthen militancy and insurgency in the troubled Pak-Afghan region. The War on Terror that prompted U.S. military adventurism in the region has proven to be a blessing in disguise for extremist and militants groups. U.S. attacks have given birth to an unprecedented level of resentment and anger among the tribal populace, which has been craftily exploited by fanatical factions through organized propaganda to successfully recruit thousands of disillusioned and impressionable young fighters for their causes. Consequently, these burgeoning violent movements embedded in religious fanaticism have dangerously engulfed many parts of Pakistan propagating insurgency, civil unrest, and terrorism.

### TARGETED KILLING COUNTERPRODUCTIVE—ALIENATES LOCAL POPULATION

**Sperotto 3/17/2010** Federico, Open Security, “Illegal and ineffective? Drone strikes and targeted killing in ‘the war on terror’” <http://www.opendemocracy.net/opensecurity/federico-sperotto/illegal-and-ineffective-drone-strikes-and-targeted-killing-in-war-on>

There are frequent episodes in which insurgents or criminals in the service of drug lords participate directly in hostilities in Afghanistan. The use of drones against those entities is legal, subject to the restrictions of international humanitarian law, so long as the conflict endures. But the issue becomes problematic in two circumstances: i) when the target is individualised in a situation other than a combat engagement; ii) when the strike violates the criteria of distinction and proportionality or, when innocent civilians are subjected to the strike. Targeting a civilian who is not directly involved in combat is a violation of humanitarian law. When the use of such weapons causes an excessive toll in human casualties, it is also illegal. Further considerations concern human rights, as targeted killings against non-combatants result in violation of the norm that prohibits extrajudicial or arbitrary killing. Targeted killing is thus illegal, except in the narrowest of war-like conditions. Strictly applied, international constraints on the use of military force against individuals would forbid nearly all real-world targeted killings. For this reason, the use of drones cannot be more than a tactic. Turning it into a strategy or policy is illegal and counterproductive. Killing the targeted and his/her relatives fails to provide an enduring advantage. It alienates populations and erodes support for counterinsurgency operations. Thus, even when lawful, the use of unmanned aerial vehicles to strike adversaries should be considered an extreme measure. It is necessary to refrain from the temptation of thinking that all is permitted in the ultimate war against terror, for reasons of humanity as well as efficiency.

### TURN: TARGETED KILLING CREATES MARTYRS

**Byman 2006** [Daniel Byman, Byman is a Brookings Institute expert on counterterrorism and Middle Eastern Security He also directs Georgetown University’s Center for Peace and Security Studies, “Do Targeted Killings Work?”, March/April 2006, <http://www.foreignaffairs.com/articles/61513/daniel-byman/do-targeted-killings-work>]

Even when they are effective, targeted killings can create strategic complications. They create martyrs that help a group sell itself to its own community. Hezbollah now venerates figures such as Musawi and uses them to rally the faithful and demonstrate the group’s commitment to fighting Israel. And Khaled Hroub, a Cambridge University-based expert on Hamas, argues that Israeli counter- terrorism measures, including targeted killings, have only increased the movement’s popular legitimacy.

### ENGAGING IN UNETHICAL ACTS UNDERMINES SUPPORT FOR US BATTLE AGAINST TERRORISM

**Alex J. Bellamy, International Relations Professor-University of Queensland, 2008, Fighting Terror: Ethical Dilemmas, p. 20**

This has been a long way round at getting to the crucial point – we cannot win the war on terror unless we conduct it in a manner that is commonly seen as legitimate. Ethics in war are never an optional extra, and in this war they are essential to victory. Moreover, persuading ourselves of the legitimacy of what we do is only one small part of the exercise. We also need to persuade Al Qaeda’s potential constituency. To do that we need high standards and a common moral language.

## **AT: “Military Framework for Terrorism Best/Justifies Drone Strikes”**

### **STATE-SPONSORED TARGET KILLINGS SHOULD BE GOVERNED BY LAW ENFORCEMENT PARADIGM**

Nils Melzer, *Legal Adviser-International Committee of the Red Cross, 2008*, Targeted Killing in International Law, p. 424

First, in order to avoid that States circumvent the strict standards imposed by the law enforcement paradigm on the use of lethal force, there must be absolute clarity as to the circumstances in which a particular operation of targeted killing must comply with these standards. As has been shown, all State-sponsored targeted killings, except those directed against legitimate military objectives during the conduct of hostilities, are governed by the paradigm of law enforcement, regardless of contextual or territorial consideration. Particularly when targeting individuals outside their territorial jurisdiction, however, or in the situations of armed conflict (but not in actual hostilities), States are still reluctant to acknowledge their obligation to respect the law enforcement paradigm.

### **TARGETED KILLINGS SHOULD BE VIEWED WITH SKEPTICISM UNDER BOTH THE LAW ENFORCEMENT AND THE MILITARY FRAMEWORK**

Nils Melzer, *Legal Adviser-International Committee of the Red Cross, 2008*, Targeted Killing in International Law, p. xiii

Any State-sponsored targeted killing other than those directed against legitimate military targets during the conduct of hostilities must be governed by the international normative paradigm of law enforcement. That paradigm does not categorically prohibit, but imposes extensive restraints on, the method of targeted killings. As a result, outside the conduct of hostilities in armed conflict, the circumstances in which States may lawfully resort to the method of targeted killings are highly exceptional. But, even in the extreme circumstances prevailing during the conduct of hostilities, no person can be lawfully “liquidated” without further consideration. In view of the special features of “individualized” or “surgical” warfare, targeted killings require a “microscopic” interpretation of the law governing the conduct of hostilities, particularly of the principles of distinction, military necessity, precaution and proportionality, but also of long-standing rules such as the prohibition of denial of quarter. This observation is especially relevant where States claim to be “at war” with loosely organized, clandestinely operating and internationally dispersed non-State actors, and may be tempted to employ targeted killings as a regular or even near exclusive method of the conduct of hostilities. In terms of concept and principle, and despite their limited quantitative scope, targeted killings must be located at the extreme end of the scale of methods permitted under the normative paradigm of hostilities. In comparing the obtained substantive results, Part D recapitulates the preconditions for the lawfulness of State-sponsored targeted killing, and identifies the distinct concerns raised by recent State practice under each normative paradigm. Lastly, a concluding Epilogue places the respective findings in the greater context of the rule of law, showing that the mere existence of normative standards is not guarantee of compliance with those standards in actual State practice. Nor would the existence of normative standards in conjunction with State compliance constitute a guarantee of their moral legitimacy. This leads to the concluding observation that, in order for the rule of law to be respected both in form and in substance, the international regulation of State-sponsored targeted killings must satisfy not only normative, but also procedural and moral requirements.

### **LAW ENFORCEMENT DIFFICULTIES DO NOT JUSTIFY LETHAL VIOLENCE**

Nils Melzer, *Legal Adviser-International Committee of the Red Cross, 2008*, Targeted Killing in International Law, p. 58

One of the central preliminary questions addressed in the discussion on the permissibility of State-sponsored targeted killing concerns the temporal and territorial scope of applicability of human rights law. The prevailing opinion is that, apart from specifically permitted derogations, human rights law is the body of law that protects all human beings at all times, including in times of armed conflict or other national emergency. While authors analyzing the Israeli policy of targeted killing emphasize the widely recognized applicability of human rights law in occupied territories, others more generally contend that the use of lethal force must comply with law enforcement standards to the extent that a State exercises effective or partial control over the concerned territory. Some authors go even further in dissociating the binding force of human rights obligations from territorial considerations and hold that the duty of a State to “respect” (i.e. not to interfere with) the right to life, as opposed to its duty to “ensure” (i.e. to actively protect) that right, “follows its agents wherever they operate.” Authors generally agree that the law enforcement standard of human rights law becomes inadequate when the violence between a State and organized armed non-State actors reaches the threshold of a non-international armed conflict. Nevertheless, it has rightly been emphasized that the inability of a State to apprehend individuals whose arrest would normally be permitted by the law does not necessarily entail that their killing becomes lawful. It is therefore widely held

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that, even in armed conflict, the use of lethal force against all persons who are not legitimate military targets must comply with human rights standards.